Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

RUETH DEVELOPMENT COMPANY and
HAROLD G. RUETH,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a consent decree with a federal agency can ever be modified after a significant change in the law makes evident that the consent decree was void *ab initio* because the agency lacked the authority to enter into or enforce the decree.

2. Whether the Seventh Circuit erred in concluding that Section 404(a) of the Clean Water Act, 33 U.S.C. § 1344(a), permits the government to regulate wetlands that "are *not* adjacent to open water" in contravention of this Court's decision in *Solid Waste Agency of N. Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 168 (2001).

STATEMENT PURSUANT TO RULE 29.6

Petitioner Rueth Development Company states that it is not a corporation. It is a limited partnership, consisting of individual general and limited partners. Petitioner Harold Rueth is an individual residing in Indiana.

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Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The district court's opinion granting Respondent's Motion to Enforce Consent Decree and denying, among other things, Petitioners' Petition for Modification of Consent Decree is published at 189 F. Supp.2d 874 (N.D. Ind. 2001). *See* Appendix ("Pet. App.") 41a-59a. The district court's subsequent opinion vacating part of that opinion but denying Petitioners' motion for reconsideration is published at 189 F. Supp.2d 874 at 883 (N.D. Ind. 2002). *Id.* at 18a-40a. The Seventh Circuit's opinion (per Flaum, C.J., joined by Posner and Kanne, JJ.) is published at 335 F.3d 598 (7th Cir. 2003). *Id.* at 1a-17a.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on July 10, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant sections of the Clean Water Act, 33 U.S.C. §§ 1311, 1344, and 1362 are set forth at Pet. App. 87a-89a.

STATEMENT

For federal agencies bringing enforcement actions, "consent decrees have become widely used as devices to facilitate settlement." *Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 524 n.13 (1986). In fact, "the vast majority of all administrative enforcement proceedings result in settlements . . . . [which] often lead to the entry of judgment by a court in the form of a consent decree." Lars Noah, *Administrative Arm-Twisting In The Shadow of Congressional Delegations of Authority*, 1997 WISC. L. REV. 873, 891 (1997).

The dual nature of consent decrees — which are both contracts and judgments — has spawned frequent litigation in the lower courts and required repeated guidance from this Court.

This case asks two questions of nationwide importance arising from the continued confusion over the nature of consent decrees in the environmental law context: *First*, can a party that entered into a consent decree with the federal government[1] *ever* modify that consent decree under Fed. R. Civ. P. 60(b)(5) after a decision of this Court significantly changes the law to make clear that the federal agency lacked the regulatory jurisdiction to enter originally into or continue to enforce the consent decree? *Second*, does this Court's recent decision in *Solid Waste Agency of N. Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"), mean that the federal government may not assert jurisdiction under Section 404(a) of the Clean Water Act, 33 U.S.C. § 1344(a) ("CWA"), over wetlands that "are *not* adjacent to open water," thus establishing a "new jurisdictional line" that limits the federal government's authority? *SWANCC*, 531 U.S. at 168 (majority opinion); *id.* at 176 (Stevens, J., dissenting, joined by Souter, Ginsburg, and Breyer, JJ.).

On the first question, this Court has stated repeatedly that consent decrees, like other judgments, may be modified pursuant to Rule 60(b)(5) in appropriate circumstances, such as when the decree is premised on a "misunderstanding of the governing law," or "when the statutory or decisional law has changed to make legal what the decree was designed to prevent."

---

1. In this case, the Consent Decree was entered by the Environmental Protection Agency ("EPA") on behalf of the United States. The Army Corps of Engineers ("ACOE") has the authority to regulate discharges into "waters of the United States," 33 U.S.C. § 1344(a), while the EPA shares concurrent jurisdiction over those waters and has the responsibility to bring enforcement actions on behalf of the ACOE. *Id.*, § 1319(b). They are referred to collectively here simply as the federal government.

Rufo v. Inmates of the Suffolk County Jail, 502 U.S. 367, 390, 388 (1992); *see also Agostini v. Felton*, 521 U.S. 203 (1997); *System Federation No. 91 v. Wright*, 364 U.S. 642 (1961). The Seventh Circuit ignored this avenue for Petitioners. While noting that the law governing the breadth of the government's jurisdiction and therefore the Consent Decree here "is obviously no longer accurate after *SWANCC*," Pet. App. 12a, the court said it "fail[ed] to see how it has any effect on the validity of the decree." *Id.* The court concluded that permitting modification of the Consent Decree would give Petitioners an impermissible "free ride on the defendants' success in *SWANCC*." *Id.* The Seventh Circuit concluded, contrary to the text of the rule and this Court's decisions in *Rufo*, *Agostini*, and *System Federation No. 91*, that parties can not have consent decrees modified even if the governing law has changed such that the agency had no authority to enter the decree in the first place.

As for the second question, despite the recency of *SWANCC*, appellate courts already conflict and a number of them have already ignored or sidestepped this Court's pronouncement that "the text of [CWA § 404(a)] does not allow" the federal government to assert jurisdiction over waters that "are *not* adjacent to open water." *SWANCC*, 531 U.S. at 168. While the Fifth Circuit has adhered to *SWANCC*, a growing number of appellate courts, including the Seventh Circuit here, have refused to view *SWANCC* as a significant limitation on the government's regulatory authority under the CWA. *See* Robin K. Craig, *Beyond SWANCC: The New Federalism and Clean Water Act Jurisdiction*, 33 ENVTL. L. 113, 115 (2003) ("for the most part, post-*SWANCC* federal courts have been less interested in adopting the *SWANCC* Court's emphasis on the role of federalism in interpreting the CWA than they have been in limiting *SWANCC* itself.").

The Seventh Circuit's departure from this Court's precedents on these two important federal questions, along with

the growing number of other cases that do as well, merits this Court's attention.

This case traces its origin to 1991 when the Environmental Protection Agency ("EPA") issued an Administrative Compliance Order against Rueth Development Company ("RDC"), asserting that RDC had illegally discharged fill material into a wetland located in the Castlewood subdivision in Dyer, Indiana in violation of CWA § 404(a). The EPA asserted in its order that the subject wetland was "adjacent to an unnamed tributary to Dyer Ditch, which flows north to Hart Ditch, which flows north to the Little Calumet River, which is a navigable water of the United States." Pet. App. 2a. RDC ultimately filed a complaint in federal court, arguing that the wetland in the Castlewood subdivision was isolated and thus beyond the government's regulatory jurisdiction under the CWA. The Seventh Circuit affirmed the dismissal of RDC's complaint because the Administrative Compliance Order was a nonreviewable preenforcement action. *Rueth v. EPA*, 13 F.3d 227, 230 (7th Cir. 1993) ("*Rueth I*"); Pet. App. 3a. In doing so, however, the Seventh Circuit made clear that under existing precedent "nearly all wetlands fall within the jurisdiction of the CWA since one test for whether the wetland affects interstate commerce is whether migratory birds use the wetland." *Rueth I*, 7 F.3d at 231 (citing *Hoffman Homes, Inc. v. EPA*, 999 F.2d 256 (7th Cir. 1993)). The court then stated in no uncertain terms that the CWA was "as far-reaching as the Commerce Clause permits" and the court was "of the opinion that the wetland at issue falls under the broad definition of 'waters of the United States' in *Hoffman Homes*." *Id.*

Thereafter, in November, 1996, the United States brought an enforcement action alleging that RDC and Harold Rueth, one of RDC's individual general partners ("Petitioners"), violated CWA § 404(a), 33 U.S.C. § 1344(a), by filling the wetland without first obtaining a permit and failing to comply with the Administrative Compliance Order. Pet. App. 4a-5a.

Petitioners disputed that the government had authority to regulate the subject wetland because it was purely intrastate and isolated and therefore not a "water of the United States." Nonetheless, given the Seventh Circuit's position in *Hoffman Homes* and the clear warning to Petitioners in *Rueth I* that even isolated wetlands could be regulated under the CWA, Petitioners decided to enter into a Consent Decree with the government. The district court entered the Consent Decree on January 26, 1999. Pet. App. 5a.

Importantly, the Consent Decree contained no admission, stipulation or finding that: (1) the government had regulatory jurisdiction over the subject wetland, (2) the wetland was "adjacent" to navigable water, or (3) the wetland was otherwise part of the "navigable waters" that comprise the "waters of the United States." 33 U.S.C. § 1362(7); 33 C.F.R. § 328.3(a). In the Consent Decree, the parties agreed that Petitioners did not admit that they had committed the violations of the CWA as set forth in the Complaint, and Petitioners specifically denied that they had unlawfully dredged or filled wetlands that were subject to federal regulation. Pet. App. 61a. Petitioners did not waive their rights to reopen, modify, or set aside the Consent Decree in the future, and the parties agreed that they each reserved whatever legal and equitable remedies they had to construe, effectuate, or enforce the Consent Decree. Pet. App. 83a. The Decree required Petitioners to pay a $23,500 penalty and restore a three acre wetland on RDC's property (Wetland Section 6). After Petitioners were unable to meet various interim deadlines set forth in the Consent Decree, in November of 2000, the government moved to enforce the Consent Decree, seeking over $6,750,000 in penalties. *Id.*

On January 9, 2001, this Court decided *SWANCC*, which held that the government's authority to regulate "waters of the United States" pursuant to CWA § 404(a) arises from its traditional authority to regulate navigation; therefore the government's attempt to regulate non-navigable, intrastate,

isolated ponds in which migratory birds occasionally alighted exceeded the scope of its authority under the CWA. 531 U.S. at 167-68. Because "when this Court construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law," *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 313, n.12 (1994), the *SWANCC* decision meant that the government never had the authority to enter into the Consent Decree with Petitioners — which, as demonstrated below, governed an isolated wetland — and certainly had no authority to continue to enforce the Consent Decree.

Two weeks later, Petitioners apprised the district court of the *SWANCC* decision, and one week thereafter, filed a Petition for Modification of Consent Decree pursuant to Fed. R. Civ. P. 60(b). Petitioners asserted that, under *SWANCC*, the United States lacked jurisdiction to regulate an isolated wetland such as the Castlewood Site under the CWA, both when it signed the Consent Decree and subsequently when it sought to enforce the Consent Decree, particularly when the agreement contained no admission that the wetlands were "waters of the United States." Petitioners made the common-sense argument that a contract entered by one who lacks authority is *ultra vires* and therefore void *ab initio*, even if the contract is a consent decree entered by a governmental entity. *See, e.g., Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 385 (1947) (FCIC insurance policy was void *ab initio* because FCIC lacked authority to issue policy). In support of their petition, Petitioners submitted an expert affidavit testifying that Wetland Section 6 was "an isolated, intrastate wetland." Their Petition sought to modify the Consent Decree pursuant to Rule 60(b) and prohibit the government from seeking to enforce the Consent Decree.

Eight months after Petitioners submitted their Rule 60(b) motion to modify the Consent Decree, the district court entered judgment in favor of the United States without a hearing, enforcing the Consent Decree and imposing $4,018,500.00 in

penalties payable jointly and severally by Petitioners — roughly their combined net worth. Pet. App. 41a-59a. In its Order, the court asserted that "the government seeks to regulate the Site on the theory that it is an 'adjacent wetland.'" *Id.* 45a. Then, for the first time, the district court found — without any evidence in the record to support its conclusion — that the wetland on the Castlewood Site was an "adjacent wetland," not an isolated wetland. According to the court, the wetland is subject to regulation by the United States because "[a] drop of rainwater landing in the Site is certain to intermingle with water from the Little Calumet River." *Id.* 46a.

On October 11, 2001, Petitioners moved to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e). They pointed out that the district court reached its conclusion that Wetland Section 6 was an "adjacent" wetland by relying on an exhibit the government submitted that discussed a *completely different wetland* than the one at issue. Petitioners demonstrated that the only evidence in the record clearly demonstrated that the wetland at issue (Wetland Section 6) is an isolated wetland with no hydrological connection to "waters of the United States." Petitioners again argued that the Consent Decree should be vacated or modified because the government never had the authority to enter into or enforce the Consent Decree regulating this isolated wetland.

On February 21, 2002, the district court vacated its finding that the wetland at issue was an "adjacent wetland" but otherwise denied Petitioners' Rule 59(e) motion. Pet. App. 18a-40a. Instead, the district court changed its approach and *presumed that the Castlewood Site wetland is isolated* (*i.e.*, it does not connect to and is not adjacent to "waters of the United States"). *Id.* 27a.

Despite the court's correct assumption that the wetland is isolated, the Court upheld its award imposing $4,018,500 in penalties on the grounds that the act of entering into the Consent Decree forever precluded Petitioners from later having the decree

modified based on the government's lack of regulatory jurisdiction. *Id.* 34a-36a. In essence, the court ignored Rule 60(b)(5) and reasoned that, because Petitioners entered into the Consent Decree, they are *per se* barred from having the Consent Decree modified even assuming the Consent Decree was void *ab initio* and the government originally had no authority to enter into the Consent Decree. *Id.* 35a-36a.

The Seventh Circuit affirmed. Pet. App. 1a-17a. Like the district court, the appellate court reasoned that entering into the Consent Decree sets up a *per se* bar that forever precludes Petitioners from having the decree modified pursuant to Rule 60(b)(5) when it becomes evident that the decree is premised on a "misunderstanding of the governing law" or "when the statutory or decisional law has changed to make legal what the decree was designed to prevent." *Rufo*, 502 U.S. at 390, 388. While acknowledging that the law in the Seventh Circuit when the Consent Decree was entered "is obviously no longer accurate after *SWANCC*," Pet. App. 12a, the court stated that it "fail[ed] to see how it has any effect on the validity of the decree." *Id.*

The court acknowledged that the district court enforced the Consent Decree despite its assumption "that the wetlands are isolated and not adjacent." Pet. App. 10a. However, the court then proceeded to ignore this, and even went so far as to speculate that perhaps the wetland was adjacent, contrary to both the district court's decision and the only evidence in the record. *Id.* 10a-11a.

Despite the fact that the case came to the Seventh Circuit under the presumption that the wetland is isolated, and despite the fact that *SWANCC* makes regulation of such wetlands beyond the government's jurisdiction, the Seventh Circuit concluded that to permit Petitioners to have the Consent Decree modified would be an impermissible "free ride on the defendants' success in *SWANCC*." *Id.* According to the court, the fact that the parties did not agree to (and the government never demonstrated) a

basis for the government's jurisdiction is irrelevant. Pet. App. 13a. Allowing Petitioners to attempt to modify the decree because the government had no basis under the CWA to enforce the Consent Decree (or to have entered it) would "render the consent decree worthless." Pet. App. 14a.

The practical effect of this decision is to permit the government to continue to enforce a Consent Decree and regulate a wholly intrastate, hydrologically isolated wetland after *SWANCC* has demonstrated that the government has no authority to do so. This conflicts sharply with Fifth Circuit's conclusion that, after *SWANCC*, isolated wetlands are beyond the government's jurisdiction under the CWA. *See Rice v. Harken Exploration Co.*, 250 F.3d 264, 265 (5th Cir. 2001) ("a body of water is subject to regulation under the CWA if the body of water is actually navigable or is adjacent to an open body of navigable water."). It also conflicts with the Fourth Circuit's decision in *United States v. Wilson*, 133 F.3d 251, 257 (4th Cir. 1997), which struck down the government's jurisdiction over isolated wetlands even before *SWANCC*. However, the Seventh Circuit's decision joins a growing body of appellate court cases in which *SWANCC* has been read, despite its clear language, to permit the government's jurisdiction to extend to wetlands that "are *not* adjacent to open water."

This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE PETITION

This case satisfies multiple criteria for Supreme Court review. First, the decision below conflicts with this Court's caselaw, including *Agostini*, *Rufo*, and *System Federation No. 91*, which permits modification of judgments, including consent decrees, under Rule 60(b)(5) when there has been a "misunderstanding of the governing law" or "when the statutory or decisional law has changed to make legal what the decree was designed to prevent." *Rufo*, 502 U.S. at 390, 388. Second, the decision below, along with a growing body of other appellate

cases, conflicts with both this Court's *SWANCC* decision and the Fifth Circuit's conclusion that, after *SWANCC*, "a body of water is subject to regulation under the CWA if the body of water is actually navigable or is adjacent to an open body of navigable water." *Rice*, 250 F.3d at 265. The *SWANCC* decision has quickly led to substantial confusion among the lower courts and even the regulatory agencies themselves as to the limits of the federal government's authority to regulate "waters of the United States." This Court's guidance therefore is needed again.

The questions presented not only are of great importance, they are likely to recur frequently because the government resolves the vast majority of its Clean Water Act enforcement actions via consent decrees. Moreover, the issue of whether a consent decree with a federal agency can be modified following a subsequent decision from this Court that the agency lacks regulatory jurisdiction over the subject matter of the consent decree has far-reaching repercussions for any and all regulatory agencies that employ consent decrees to resolve their enforcement actions as well as their regulated entities. This petition should therefore be granted.

I. The Decision Below Conflicts With Established Rule 60(b)(5) Jurisprudence As Applied to Consent Decrees.

This Court has explained that "consent decrees 'have attributes both of contracts and of judicial decrees,'" giving them a "dual character that has resulted in different treatment for different purposes." *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 519 (1986) (quoting *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236 n.10 (1975)). That duality has led to confusion over when to treat a consent decree as one or the other or both.[2] Whether parties can

2. The court below diverged from proper canons of consent decree construction on a number of levels. *Compare United States v. Armour &* (Cont'd)

have a consent decree with the government modified, as if it were any other kind of judgment, when "it is no longer equitable that the judgment should have prospective application," Fed. R. Civ. P. 60(b)(5), because the federal agency never had authority to enter into the consent decree is a question that remains to be answered by this Court.

A. The Seventh Circuit's Decision Conflicts With This Court's Established Precedent Permitting Modification of Consent Decrees

The Seventh Circuit in this case concluded that Petitioners' "consent" in entering into the Consent Decree forecloses their ability under Rule 60(b)(5) from having the Consent Decree itself modified. Pet. App. 11a. This logic simply cannot be true because, if it were, there would be no cases in which Rule 60(b)(5) applied to consent decrees. Of course, this is not the case. "There is no suggestion in [this Court's cases] that a consent decree is not subject to Rule 60(b)." *Rufo*, 502 U.S. at 378.

This Court has stated that "a consent decree or order is to be construed for enforcement purposes basically as a contract." *ITT Continental Baking Co.*, 420 U.S. at 238; *see also Ahern v. Board of Education*, 133 F.3d 975, 981 (7th Cir. 1998) ("Although consent decrees have the force of a court order, they are also a form of contract to be construed according to basic principles of contract interpretation."). Consent decrees must be governed by contract law because "it is the parties' agreement that serves as the source of the court's authority to enter any judgment at all." *Local Number 93*, 478 U.S. at 522.

(Cont'd)

Co., 402 U.S. 673, 682 (1971) ("the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it.") *with* Pet. App. 15a (stating that "we must 'look at the evil which the decree was designed to rectify.'").

Under traditional methods of contract interpretation, a contract entered by one without authority is *ultra vires* and therefore void *ab initio*, even when the party without authority is the government. *See, e.g.*, *Merrill*, 332 U.S. at 385 (FCIC insurance policy was void *ab initio* because FCIC lacked authority to issue policy); *The Floyd Acceptances*, 74 U.S. (7 Wall.) 666, 671, 681 (1869) (without proper statutory authority, contract between Secretary of War and merchant was void because "the secretary was acting wholly beyond the scope of his authority"); *United States v. Amdahl Corp.*, 786 F.2d 387, 392-93 (Fed. Cir. 1986) ("[a]dministrative actions taken in violation of statutory authorization or requirement are of no effect. . . . The courts are bound to strike down illegal contracts."); 12 WILLISTON ON CONTRACTS § 35:63 (4th ed. 1999) (summarizing general rule that *ultra vires* contracts by governments are void).

Indeed, nowhere should this maxim apply with more force than where a regulatory agency, which is purely a creature of statute, is involved. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) ("[N]o matter how 'important, conspicuous, and controversial' the issue . . . an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress."); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power . . . is limited to the authority delegated by Congress.").

The Court has applied this hornbook rule even in consent decree cases involving the government. For example, in *United States v. Beebe*, 180 U.S. 343 (1901), a government prosecutor entered into a consent judgment with two sureties in which the government agreed to dismiss claims for monies owed in return for each defendant paying $100. Years after the court entered the consent judgment, the government sought to void it because the prosecutor lacked the authority under federal law to enter into a compromise judgment without the consent of the Solicitor

of the Treasury. *Id.* at 351. This Court agreed, vacating the judgment and returning the parties to the *status quo ante* because "[a] judgment entered upon such a compromise is subject to be set aside on the ground of the lack of authority in the attorney to make the compromise upon which the judgment rests." *Id.* at 352.

The government's authority to enter into a consent decree is always subject to these limitations. *SWANCC*, as discussed *infra*, established that the "text of the statute does not allow" the government to assert jurisdiction over waters that "are *not* adjacent to open water." *SWANCC*, 531 U.S. at 168. This limit on the government's jurisdiction under CWA § 404(a) means that it had no authority to enforce the Consent Decree or enter into it in the first instance. The Consent Decree was void *ab initio*.

In this type of circumstance, where there has been "a significant change either in factual conditions or in law," *Rufo*, 502 U.S. at 384, this Court has stated that modification of a consent decree, like any other type of judgment, is appropriate. *See id.* at 388 ("modification of a consent decree may be warranted when the statutory or decisional law has changed to make legal what the decree was designed to prevent."). *See also System Federation No. 91*, 364 U.S. at 651 (consent decree is "not an abandonment of the right to exact revision in the future if revision should become necessary in adaptation to events to be.").

While a decision that simply "clarifies the law will not, in and of itself, provide a basis for modifying a decree," even that lesser circumstance "could constitute a change in circumstances that would support modification if the parties had based their agreement on a misunderstanding of the governing law." *Rufo*, 502 U.S. at 390; *see also System Federation No. 91*, 364 U.S. at 650 n.6 ("There are many cases where a mere change in decisional law has been held to justify modification of an outstanding injunction."). In fact, "[a] court errs when it refuses

to modify an injunction or consent decree in light of such changes." *Agostini v. Felton*, 521 U.S. 203, 214 (1997).

When a change in the law alters the breadth of a statute's reach, it is particularly appropriate to modify a consent decree impacted by that statute. For example, in *System Federation No. 91*, when the Railway Labor Act prohibited union-shop agreements between railroads and labor unions, nonunion railroad employees brought suit against the railroad and certain unions which resulted in a consent decree forbidding the defendants from discriminating against workers who refused to join unions. 364 U.S. at 644. When the statute was later amended to permit union-shop agreements between railroads and unions, the unions moved under Rule 60(b)(5) to have the decree modified to allow the unions and railroads to enter such agreements. *Id.* at 645. This Court held that it was an abuse of discretion to refuse to modify the consent decree because the change in the law had made lawful what was previously prohibited. *Id.* at 651-52. This Court reasoned that a court "must be free to modify the terms of a consent decree when a change in law brings those terms in conflict with statutory objectives." *Id.* at 651.

That the judgment arose from a consent decree and not litigation does not matter. According to this Court, "[t]he result is all one whether the decree has been entered after litigation or by consent." *Id.* at 651 (quoting *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932)). A party "ha[s] no power to require of the court continuing enforcement of rights the statute no longer gives." *Id.* at 652.

This Court has made clear repeatedly that when the law changes such that a consent decree's terms conflict with the governing statute, the decree should be modified. *See, e.g., Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 576 n.9 (1984) ("when a change in the law brought the terms of the decree into conflict with the statute pursuant to which the decree was entered, the decree should be modified

over the objections of one of the parties bound by the decree.") (emphasis added); *Local Number 93*, 478 U.S. at 526 (parties to a consent decree may not "agree to take action that conflicts with or violates the statute upon which the complaint was based."). In fact, while courts often have discretion to modify consent decrees, when a decree is based on an erroneous view of the law, it must be modified. *See Agostini*, 521 U.S. at 238 ("the exercise of discretion cannot be permitted to stand if [the court] find[s] it rests upon a legal principle that can no longer be sustained.").

Despite this Court's repeated pronouncements and despite acknowledging that the law governing the breadth of the government's jurisdiction and therefore the Consent Decree was "obviously no longer accurate after *SWANCC*," Pet. App. 12a, the court said it "fail[ed] to see how it has any effect on the validity of the decree." *Id.* Petitioners believe it is self-evident.

Though Petitioners never agreed that the wetland at issue was "adjacent" or otherwise part of the "waters of the United States," and never agreed to waive the right to contest the government's jurisdiction in the future, the court concluded that Petitioners' act of entering into the Consent Decree was sufficient by itself to compel adherence to the Decree. Though the district court enforced the Consent Decree based on the premise that the wetland was isolated which, according to *SWANCC*, "the text of the statute does not allow," *SWANCC*, 531 U.S. at 168, the Seventh Circuit concluded that Petitioners' consent to the decree obviated their right to have the Consent Decree modified after *SWANCC* changed the governing law. According to the court, Petitioners' decision to enter into the decree rather than litigate forever foreclosed their right to raise this issue after this Court changed the governing law. The Seventh Circuit's estoppel theory thus writes Rule 60(b)(5) out of the Federal Rules of Civil Procedure for *all* settlements. Because the Seventh Circuit's position conflicts sharply with this Court's opinions on the modification of consent decrees, the petition for certiorari

should be granted and the Seventh Circuit's decision should be reversed.

B. The Decision Conflicts With Other Decisions Regarding the Availability of Post-Consent Judgment Relief

The Seventh Circuit's position that Petitioners' agreement to the Consent Decree prohibited them from having the decree modified later based on a subsequent change in the law also diverges from the law dealing with other types of consent judgments. Perhaps the cases most analytically similar to Petitioners' situation are those in which criminal defendants have had their sentences vacated after a subsequent decision from this Court establishes that the activity for which they were convicted was not criminal. This has occurred after both trials and guilty pleas in which a defendant agrees to both the elements of an offense and even the imposition of a sentence. *See, e.g., Stanback v. United States*, 113 F.3d 651, 654 (7th Cir. 1997) (vacating conviction and sentence after a guilty plea where underlying facts no longer were considered a crime); *United States v. Loschiavo*, 531 F.2d 659, 667 (2nd Cir. 1976) (trial).[3] As one court has stated, a judgment pursuant to a plea

3. Courts have frequently vacated guilty pleas (or at least acknowledged the ability to do so) through the writ of coram nobis (Rule 60(b)'s criminal counterpart) based on a subsequent decision by this Court. *See, e.g., United States v. Lewis*, 478 F.2d 835, 836 (5th Cir. 1973) (vacating plea-conviction due to subsequent decision by this Court); *DeCecco v. United States*, 485 F.2d 372, 374 (1st Cir. 1973) (same); *Lawson v. United States*, 397 F. Supp. 370, 371 (N.D. Ga. 1975) (same); *United States v. Russo*, 358 F. Supp. 436, 438 (D.N.J. 1973); (same); *United States v. Summa*, 362 F. Supp. 1177, 1179 (D. Conn. 1972) (same). In addition, this Court recently held that guilty pleas can be reviewed via a writ of habeas corpus after it has concluded subsequently that the underlying activity is not criminal. *See Bousley v. United States*, 523 U.S. 614, 620 (1998) ("it would be inconsistent with the doctrinal underpinnings of habeas review to preclude petitioner from relying on our decision in *Bailey* in support of his claim that his guilty plea was constitutionally invalid.").

agreement is "fatally and constitutionally tainted for lack of due process of law" where a subsequent Supreme Court decision has made clear that the activity for which he was convicted was not a crime. *United States v. Sawyer*, 74 F. Supp. 2d 88, 106 (D. Mass. 1999).[4] According to that court, to preclude attacking the plea agreement (or the analogous Consent Decree here) would be "a legal error of fundamental proportion." *Id.*

The court below took the opposite view of decisions by this Court which dramatically alter the validity of previously consented-to agreements. Rather than conclude that continuing to enforce an agreement where the underlying law has been reversed would be "a legal error of fundamental proportion," the court below concluded that it "fail[ed] to see how it has any effect on the validity of the decree." Pet. App. 12a. Under the Seventh Circuit's logic, the decision to enter into a plea agreement rather than litigate forever cuts off the ability to seek relief after this Court determines that the agreed-to conduct was not actually criminal. To resolve this split in authority, certiorari should be granted here.

II. The Decision Below Permits The Federal Government to Continue Regulating An Isolated Wetland In Contravention Of This Court's Reasoning in *SWANCC*.

The Seventh Circuit's decision allows the federal government to continue to regulate an isolated, non-navigable, intrastate wetland and seek over $4,000,000 in penalties from Petitioners via a Consent Decree which, according to *SWANCC*, the government lacked the authority to enter into in 1999 and certainly now lacks the authority to enforce. With this decision,

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4. The vacation of Sawyer's sentence was subsequently reversed by the First Circuit because, in the First Circuit's view, Sawyer was guilty of violating the statute even based on this Court's interpretation of the governing statute. *United States v. Sawyer*, 239 F.3d 31 (1st Cir. 2001). The First Circuit nonetheless assumed that a writ of coram nobis is available to vacate a criminal conviction based on a guilty plea which is premised on a fundamental error of law. *Id.* at 38.

the court below has joined a growing body of appellate courts, along with the government, which have refused to adhere to the Court's conclusion that "the text of [CWA § 404(a)] will not allow" the jurisdiction of the government to extend to waters that "are *not* adjacent to open water." *SWANCC*, 531 U.S. at 168.

A. The Decision Below Contradicts This Court's Prior Caselaw Interpreting CWA § 404(a)

This Court has explained repeatedly that the scope of the CWA, and therefore the government's authority to regulate pursuant to it, relies heavily on traditional concepts of navigation and what constitutes "navigable waters." CWA § 404(a), 33 U.S.C. § 1344(a), authorizes the ACOE to issue permits approving "the discharge of dredged or fill material into the navigable waters." Discharges not authorized by the ACOE are prohibited. CWA § 301(a), 33 U.S.C. § 1311(a). "Navigable waters" are defined as "waters of the United States." 33 U.S.C. § 1362(7). By regulation, the ACOE and the EPA have defined the scope of their jurisdiction over "waters of the United States" to include, among other things, certain types of wetlands. 33 C.F.R. § 328.3(a) (ACOE definition); 40 C.F.R. § 230.3(s) (essentially identical EPA definition).

In 1985, this Court decided *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), in which it upheld the government's jurisdiction over a wetland that was not itself navigable, but which physically abutted a navigable creek and therefore was "adjacent to a body of navigable water." *Id.* at 131. The government's jurisdiction was based upon that portion of the definition of "waters of the United States" now found at 33 C.F.R. § 328.3(a)(7) which encompasses adjacent wetlands. *See also* 33 C.F.R. § 328.3(c) (defining "adjacent" as "bordering, contiguous, or neighboring" and also including "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like"); 40 C.F.R. § 230.3(b) (same). In concluding that

this adjacent wetland acceptably fell within CWA § 404(a)'s definition of "waters of the United States," the Court specifically stated that it "d[id] not express any opinion" on the "question of the authority of the [government] to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water." *Riverside Bayview Homes*, 474 U.S. at 131 n.8.

A separate portion of the definition of "waters of the United States" addresses "isolated" waters, including isolated wetlands. These are defined to include:

> (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
>
> (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
>
> (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
>
> (iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

33 C.F.R. § 328.3(a)(3).

In 1986, the year after *Riverside Bayview Homes*, the ACOE issued a "clarification" which expanded its jurisdiction under § 328.3(a)(3) over intrastate waters:

> (a) Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or

(b) Which are or would be used as habitat by other migratory birds which cross state lines; or

(c) Which are or would be used as habitat for endangered species; or

(d) Used to irrigate crops sold in interstate commerce.

51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986).

This was the Migratory Bird Rule, issued without formal notice and comment, *see* 5 U.S.C. § 553, and never codified in the definition of "waters of the United States."

The Court revisited the issue of the breadth of the government's jurisdiction under these regulations two years ago in *SWANCC* in the context of a non-navigable, intrastate, isolated area of seasonal ponds which were periodically visited by migratory birds. There, this Court specifically invalidated 33 C.F.R. § 328.3(a)(3), as clarified by the Migratory Bird Rule, as exceeding the authority granted by Congress in CWA § 404(a). *SWANCC*, 531 U.S. at 174. While focusing on the Migratory Bird Rule, the Court's analysis demonstrates that it applies equally to all other types of non-navigable, intrastate, isolated waters, such as the isolated wetland at issue here. The Court explained that:

> It was the significant nexus between the wetlands and "navigable waters" that informed our reading of the CWA in *Riverside Bayview Homes*. Indeed, we did not "express any opinion" on the question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water. . . ." 474 U.S. at 131-132, n.8. In order to rule for [the ACOE] here, we would have to hold that the jurisdiction of the Corps extends to

> ponds that are *not* adjacent to open water. But we conclude that the text of the statute will not allow this.

SWANCC, 531 U.S. at 167-68.

Thus, the Court clearly stated that "the text of the statute will not allow" the government to assert jurisdiction over waters "that are *not* adjacent to open water," such as a wholly intrastate, isolated wetland not adjacent to navigable waterways or their tributaries, as is at issue here. *Id.* at 168. Congress's authority to enact the CWA stems from "its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Id.* at 172. According to the Court, the ACOE shared that understanding prior to the 1986 passage of the Migratory Bird Rule. Before that time, the ACOE grounded its view of "waters of the United States" in traditional notions of navigation. The ACOE declared that "the determinative factor" in deciding whether it had jurisdiction to regulate a particular body of water was "the water body's capability of use by the public for purposes of transportation or commerce . . ." *Id.* at 168 (quoting 33 C.F.R. § 209.260(e)(1) (1974)).

The four Justices who dissented in *SWANCC* also clearly recognized and articulated that conclusion. According to the dissent, "[i]n its decision today, the Court draws a new jurisdictional line, one that invalidates the 1986 migratory bird regulation as well as the Corps' assertion of jurisdiction over all waters except for actually navigable waters, their tributaries and wetlands adjacent to each." *Id.* at 176 (Stevens, J., dissenting). The dissent explained that the decision limited the ACOE's jurisdiction to what the agency termed "Phase 1" and "Phase 2" waters, *i.e.*, navigable waters and their contiguous wetlands, and primary tributaries of navigable waters and their adjacent wetlands. *Id.* at 189 (Stevens, J., dissenting); *see also* 33 C.F.R. § 328.2(j) (1981) (defining "primary tributaries" as "the main stems of tributaries directly connecting to navigable

waters of the United States up to their headwaters and does not include any additional tributaries extending off of the main stems of these tributaries."). In doing so, it effectively "excise[d] from the scope of the [CWA]" so-called "Phase 3" waters which include "isolated waters [such] as intermittent rivers, streams, tributaries, and perched wetlands that are not contiguous or adjacent to navigable waters." *SWANCC*, 531 U.S. at 189 & n.14.

The CWA's legislative history underscores the conclusion of this Court that the government's jurisdiction is limited to those waters which could be used for navigation purposes in commerce and those waters that are tributaries or adjacent to such waters. According to conferees on the CWA, "navigable waters" are defined as:

> all water bodies, such as lakes, streams, and rivers, regarded as public navigable waters in law which are navigable in fact. It is further intended that such waters shall be considered to be navigable in fact when they form, in their ordinary condition by themselves or by uniting with other waters or other systems of transportation, such as highways or railroads, a continuing highway over which commerce is or may be carried on with other States. . . .

118 Cong. Rec. 33,699 (1972) (statement of Sen. Muskie, sponsor and floor manager of Senate version of CWA); *see also* 118 Cong. Rec. 33,756-57 (1972) (statement of Rep. Dingell) (defining "navigable waters" to mean "that the waterway serves as a link in the chain of commerce among the States as it flows in the various channels of transportation.").

Therefore, the scope of the government's authority to regulate pursuant to the CWA is limited to waters which are part of a "continuing highway over which commerce" travels between the states. That is, Congress limited the government's

regulatory authority under the CWA to waters that are navigable, tributaries to such waters, and wetlands that are immediately adjacent to such waters.[5]

The effect of the Seventh Circuit's decision is to perpetuate the government's assertion of regulatory jurisdiction over the isolated wetland here in contravention of the Court's holding and reasoning in *SWANCC*. The district court clearly vacated its finding of adjacency and presumed correctly that this wetland is isolated, Pet. App. 22a, 27a, meaning that it is not "bordering, contiguous, or neighboring" "navigable waters." 33 C.F.R. § 328.3(c) (definition of "adjacent").[6] The *SWANCC* majority

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5. Perhaps to underscore this point, soon after the *SWANCC* decision, this Court vacated and remanded a judgment affirming a developer's conviction for unlawfully filling wetlands in light of *SWANCC*. There, the government had not invoked the Migratory Bird Rule to support its alleged jurisdiction, and the conviction left it unclear whether the subject wetland was isolated or adjacent. *Rapanos v. United States*, 533 U.S. 913 (2001). *See Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (GVR order is "potentially appropriate" when there is "reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation. . . .").

Following remand, the district court dismissed the case because the wetlands were between eleven and twenty miles from the nearest navigable-in-fact waters and so "were not directly adjacent to navigable waters." *United States v. Rapanos*, 190 F. Supp.2d 1011, 1013-14 & 1017 (E.D. Mich. 2002). However, the Sixth Circuit has since reinstated the conviction, reasoning that *SWANCC* did not "restrict[] the Act's coverage to only wetlands directly abutting navigable water." *United States v. Rapanos*, 339 F.3d 447, 453 (6th Cir. 2003) (discussed *infra*).

6. The Seventh Circuit's digressions about adjacency, Pet. App. 10a-11a, draw no conclusions about the issue (nor could they as an appellate court, without an evidentiary hearing) and are completely belied by: (1) the district court's *vacatur* of its factual finding that the wetland is adjacent, Pet. App. 27a; (2) the uncontradicted evidence in the record;

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stated plainly that "the text of the statute does not allow" the government to assert jurisdiction over waters "that are *not* adjacent to open water." 531 U.S. at 168. As the dissent in *SWANCC* makes clear, this is a "new jurisdictional line" that "invalidates . . . the [government's] assertion of jurisdiction over all waters except for actually navigable waters, their tributaries and wetlands adjacent to each" and "excises . . . from the scope of the [CWA]" "isolated waters [such] as intermittent rivers, streams, tributaries, and perched wetlands that are not contiguous or adjacent to navigable waters." *Id.* at 176, 188 & n.14 (Stevens, J., dissenting, joined by Souter, Ginsburg, and Breyer, JJ.).

The isolated wetland here, by definition, is "*not* adjacent to open water" and "not contiguous or adjacent to navigable waters." Because this Court in *SWANCC* determined that such wetlands are beyond the scope of the government's jurisdiction based on the text of CWA § 404(a), the government lacked statutory authority when it brought an enforcement action against Petitioners regarding this wetland and subsequently entered into the Consent Decree. It certainly lacks the authority to continue to seek enforcement of the Consent Decree after *SWANCC*. The Seventh Circuit's decision must therefore be reversed.[7]

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and (3) the lack of any admission whatsoever by Petitioners in the Consent Decree itself that the wetland is "adjacent" or otherwise part of the "waters of the United States." In fact, according to the government's own allegations in its 1991 Administrative Compliance Order (which were rebutted by Petitioners' uncontradicted evidence), the wetland is "adjacent to an unnamed tributary to Dyer Ditch which flows north to Hart Ditch which flows north to the Little Calumet River, which is a navigable water of the United States." The court's thought that this might constitute "adjacency" when even the ACOE defines adjacent as "bordering, contiguous, or neighboring," 33 C.F.R. § 328.3(c), only further demonstrates the need for additional guidance from this Court in this confused area.

7. In reaching its conclusion, the Seventh Circuit relied heavily on its prior decision in *United States v. Krilich*, 303 F.3d 784 (Cont'd)

B. Appellate Courts Already Conflict About the Scope of the Government's CWA § 404(a) Jurisdiction After *SWANCC*

In scarcely two years, lower courts have already divided on several issues regarding how far the government's jurisdiction extends under CWA § 404(a), particularly with regard to its jurisdiction to regulate wetlands. *See, e.g., United States v. Rapanos*, 339 F.3d 447, 451 (6th Cir. 2003) ("Wetlands have presented one of the most difficult areas in which to determine the Clean Water Act's exact jurisdictional limitations."). The first is whether *SWANCC* simply invalidated the Migratory Bird Rule or whether its logic applies more broadly to invalidate any assertion of jurisdiction by the government over isolated wetlands under any portion of 33 C.F.R. § 328.3(a)(3). Because the district court vacated its finding that the wetland here is adjacent, Pet. App. 27a, that issue more directly affects this case. The second issue is closely-related to the first. Did *SWANCC* impact how far along the spectrum between adjacent wetlands and isolated wetlands the government's CWA § 404(a) jurisdiction extends? Rather than address the government's inability to continue regulating isolated wetlands, the government (and some courts) have tried to limit *SWANCC*'s application to isolated wetlands and then espouse an incredibly broad interpretation of what constitutes an adjacent wetland which is inconsistent with this Court's prior interpretations of CWA § 404(a) in *SWANCC* and *Riverside Bayview Homes*. *See, e.g., United States v. Interstate General Co.*, 2002

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(7th Cir. 2002), *cert. denied*, 123 S. Ct. 1782 (2003), which differs greatly from this case. In *Krilich*, the court concluded that *SWANCC* did not require modification of a CWA consent decree because: (1) the developer had "already agreed that the waters [at issue] were 'waters of the United States,'" *id.* at 791; and (2) the parties expressly agreed that the decree would interpret CWA § 404(a) to exclude isolated wetlands from the ACOE's jurisdiction, *id.* at 791. These dispositive admissions are missing in Petitioners' Consent Decree.

WL 1421411, *3 (4th Cir. July 2, 2002) (concluding that "the only clear change in law made by *SWANCC* is much more narrow," affecting only "the Corps's jurisdiction over an *isolated* intrastate body of water.").

Both issues have become critically important since *SWANCC* ended the government's heavy reliance on the Migratory Bird Rule as a basis for jurisdiction. *See* John D. Ostergren, *SWANCC in Duck Country: Will Court-Ordered Devolution Fill the Prairie Potholes?* 22 STAN. ENVTL. L.J. 381, 395 (2003) ("jurisdiction under the [Migratory Bird Rule] was so broad that the Corps had little incentive to distinguish between adjacent and isolated wetlands. After *SWANCC*, what remains of this rule, or of jurisdiction under Section 328.3(a)(3) generally, remains unclear and hotly contested."); *see also id.* at 393 ("By forcing greater reliance on adjacency as a basis for federal jurisdiction, *SWANCC* is balkanizing the circuits on these issues. A uniform position appears unlikely to emerge until the Supreme Court revisits adjacency jurisdiction.").

With regard to the government's ability to regulate isolated waters, including isolated wetlands, the Fifth Circuit has relied on *SWANCC* to conclude that such regulation is no longer permissible. *See Rice v. Harken Exploration Co.*, 250 F.3d 264, 269 (5th Cir. 2001) ("a body of water is subject to regulation under the CWA if the body of water is actually navigable or is adjacent to an open body of navigable water."). In addition, the Fourth Circuit, even before *SWANCC*, struck down 33 C.F.R. § 328.3(a)(3) because it had "nothing to do with navigable or interstate waters." *United States v. Wilson*, 133 F.3d 251, 257 (4th Cir. 1997). Both these circuits, therefore, starkly conflict with the Seventh Circuit's decision below which permits continued regulation of an isolated wetland.

As for the "adjacency" question, courts have now stretched the definition of "adjacent" to "navigable waters" from the more familiar definition set forth in the regulations, *i.e.*, "bordering, contiguous, or neighboring," 33 C.F.R. § 328.3(c), to include

wetlands that drain waters that flow through man-made culverts, ditches, and drains, or that flow seasonally or intermittently, or that are many miles from navigable waters. For example, the Sixth Circuit recently reinstated a conviction for illegally filling an "adjacent" wetland that was "between eleven and twenty miles from the nearest navigable-in-fact water." *Rapanos*, 339 F.3d at 449. The Sixth Circuit concluded that *SWANCC* did not restrict "the Act's coverage to only wetlands directly abutting navigable water." *Id.* at 453. The court found a "significant nexus" between the wetlands and 'navigable waters,' via a drain that connected the wetland to a navigable river. *Id.*

Other courts, including the Second, Fourth, Ninth, and Eleventh Circuits, have concluded that, so long as a wetland is adjacent to some part of an entire tributary system that ultimately flows at some point into a navigable water, even roadside ditches are a sufficient basis for the government to assert jurisdiction. *See United States v. Deaton*, 332 F.3d 698, 710-12 (4th Cir. 2003); *see also Treacy v. Newdunn Associates, LLP*, 2003 U.S. App. LEXIS 18681, *23-26 (4th Cir. September 10, 2003) (applying *Deaton* and finding adjacency via a 2.4 mile series of natural and manmade ditches alongside interstate highways); *Headwaters v. Talent Irrigation Dist.*, 243 F.3d 526, 534 (9th Cir. 2001) ("Even tributaries that flow intermittently are waters of the United States"); *United States v. TGR Corp.*, 171 F.3d 762, 764 (2d Cir. 1999) (non-navigable tributaries flowing into navigable streams are 'waters of the United States'"); *United States v. Eidson,* 108 F.3d 1336 (11th Cir. 1997) (manmade ditches and canals that flow intermittently into creek may be tributaries); *United States v. Lamplight Equestrian Ctr.*, 2002 U.S. Dist. LEXIS 3694, *27 (N.D. Ill. 2002) ("tributaries three times removed from navigable waters can fall under federal jurisdiction. Even where the distance from the tributary to the navigable water is significant, the quality of the tributary is still vital to the quality of the navigable waters.").

The Seventh Circuit's ruminations that the wetland here might be adjacent despite the district court's explicit *vacatur* of that determination fall squarely within these cases as well. Pet. App. 10a-12a. And they all seem clearly at odds with the ACOE's former definition of "primary tributaries" as being limited to "the main stems of tributaries directly connecting to navigable waters of the United States up to their headwaters and does not include any additional tributaries extending off of the main stems of these tributaries." 33 C.F.R. § 328.2(j) (1981).

A few courts have concluded that *SWANCC* addressed more than simply isolated wetlands and now has raised the threshold for the government to assert adjacency jurisdiction as well. *See, e.g., FD&P Enterp., Inc. v. U.S. Army Corps of Engineers*, 239 F. Supp.2d 509, 516 (D.N.J. 2003) (SWANCC requires that "a 'significant nexus' [to navigable waters] must constitute more than a mere 'hydrological connection.'"); *United States v. RGM Corp.*, 222 F. Supp.2d 780 (E.D. Va. 2002) (wetlands not contiguous to navigable river so jurisdiction not established based upon adjacency to navigable water).

The divergence of methodologies and results since *SWANCC* strongly suggests that this Court should provide additional guidance as to the limits of CWA § 404(a) jurisdiction.

C. Even the Regulating Agencies Have Expressed Confusion Over The Breadth Of Their Jurisdiction

Even the EPA and ACOE have expressed uncertainty over the impact of *SWANCC* on their regulatory jurisdiction. In their recent Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," the general counsels for their respective agencies stated that, "in light of *SWANCC*, it is uncertain whether there remains any basis for jurisdiction under the other rationales of § 328.(a)(3)(i)-(iii) over isolated, non-navigable, intrastate waters . . ." 68 Fed. Reg. 1991, 1997 (Jan. 15, 2003) (attaching Joint Memorandum of Robert E. Fabricant, General Counsel,

Environmental Protection Agency and Steven J. Morello, General Counsel, Department of the Army). The agencies also remarked that "the Supreme Court has not itself defined the term 'adjacent,' nor stated whether the basis for adjacency is geographic proximity or hydrology." *Id.* Notwithstanding this confusion, as is apparent in this case, the government still continues to assert the most narrow interpretation of *SWANCC* possible and the broadest vision of its regulatory authority in litigation. *See also In re Veldhuis*, 2002 EPA ALJ LEXIS 39, *177-78 (June 24, 2002) (jurisdictional connection to navigable waters "is not precluded by the distances or number of tributary connections involved, the intermittency of the connection, or the fact that some tributaries may have been of human construction.").

Federal regulators, the courts, and certainly the regulated entities such as Petitioners have struggled to interpret the scope of CWA § 404(a) jurisdiction ever since the *SWANCC* decision was handed down. They will continue to do so absent additional guidance from this Court. This petition for writ of certiorari should therefore be granted.

CONCLUSION

For all of the foregoing reasons, the petition should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED JULY 10, 2003

IN THE
UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 02-2045

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RUETH DEVELOPMENT CO. and HAROLD G. RUETH,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.
No. 2:96-cv-540—**James T. Moody**, *Judge*

ARGUED APRIL 9, 2003—DECIDED JULY 10, 2003

Before FLAUM, *Chief Judge*, and POSNER and KANNE, *Circuit Judges*.

FLAUM, *Chief Judge*. In 1996 the United States sued the Rueth Development Company and Harold Rueth (collectively "Rueth") under the Clean Water Act, 33 U.S.C. § 1251 *et seq.* ("CWA" or "the Act"), for failure to obtain a permit before discharging dredged or fill material into four

acres of wetlands located in Dyer, Indiana. Rueth chose to settle the suit and entered into a consent decree that required him to restore the wetlands by specified dates. When he failed to meet those deadlines, the government moved to enforce the agreement, seeking over $6,750,000 in penalties. Rueth responded by petitioning for modification or vacatur of the consent decree based on the Supreme Court's decision in *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs,* 531 U.S. 159 (2001) ("*SWANCC*"), which he claimed was a material change in law affecting the decree's validity. The district court disagreed, granted the government's motion to enforce, and assessed penalties in the amount of $4,018,500, and Rueth appeals. We affirm.

I. Background

In April 1991 the Environmental Protection Agency ("EPA") issued an administrative compliance order under 33 U.S.C. § 1319(a), finding that Rueth had illegally discharged dredged or fill material into wetlands located in the Castlewood subdivision of southeastern Dyer. The fill was specifically found to have been placed in wetlands "adjacent to an unnamed tributary to Dyer Ditch, which flows north to Hart Ditch, which flows north to the Little Calumet River, which is a navigable water of the United States." The compliance order directed Rueth to cease all discharges and restore the wetlands to their original condition, warning that noncompliance could result in the assessment of substantial penalties under the CWA.

Rueth then proceeded to apply for an after-the-fact permit from the United States Army Corps of Engineers ("Corps").

The Corps declined to give approval, however, noting its concern that Rueth was presenting his development plans in a piecemeal fashion in an attempt to avoid a comprehensive review of their cumulative environmental impact. The Corps stated that it would reconsider its position if Rueth modified his plans so that less than ten acres of wetlands were affected.

Rueth did not submit new development plans, reapply for a permit, or undertake the restoration activities outlined in the administrative compliance order. Instead, he filed a complaint for equitable relief in the district court, claiming that the government lacked regulatory jurisdiction over the wetlands in the Castlewood subdivision. But because the administrative compliance order was a pre-enforcement action not subject to judicial review, the district court dismissed the suit, and we affirmed, stating that Rueth could contest jurisdiction if and when the EPA sought judicial or administrative enforcement of penalties against him. *Rueth v. EPA,* 13 F.3d 227, 230 (7th Cir. 1993) ("*Rueth I* "). We also remarked in passing,

> We acknowledge that our holding places Rueth somewhat in limbo until such time as the EPA seeks to enforce the compliance order or assess administrative penalties. . . . Responsibility for this predicament does not fall entirely on the EPA and the Corps of Engineers, as any reasonable and experienced developer such as Rueth should have known that the wetlands were potentially subject to regulation. Perhaps Rueth is in its present predicament because it attempted to short cut and take an end-run around the permit

> requirement. . . . Of course, Rueth now argues that it had no idea the wetlands at the Castlewood development were "waters of the United States" [within the meaning of the CWA]. As our decision in *Hoffman Homes, Inc. v. EPA*, 999 F.2d 256, 261 (7th Cir. 1993), makes clear, however, nearly all wetlands fall within the jurisdiction of the CWA since one test for whether the wetland affects interstate commerce is whether migratory birds use the wetland. Decisions such as *Hoffman Homes*, give full effect to Congress's intent to make the Clean Water Act as far-reaching as the Commerce Clause permits. On the other hand, it is not inconceivable that the EPA or the Corps of Engineers might completely overextend their authority. In such a case, we suggest to those agencies that we will not hesitate to intervene in pre-enforcement activity, but this is not the case as we are of the opinion that the wetland at issue falls under the broad definition of "waters of the United States" in *Hoffman Homes*.

Rueth I, 13 F.3d at 230-31 (citation omitted).

By November 1996 Rueth had still not performed the tasks outlined in the administrative compliance order, prompting the government to file this enforcement action. The complaint asserted two bases for the government's regulatory jurisdiction: (1) adjacency—specifically, that the Castlewood wetlands were "adjacent to waters which flow into the Little Calumet River, an interstate stream, which itself is a 'water of the United States' within the meaning of

the CWA," *see* 40 C.F.R. § 230.3(s)(7); and (2) effect on interstate commerce, *see id.* § 230.3(s)(3). In addition to injunctive relief, the complaint requested that the district court assess a civil penalty under 33 U.S.C. § 1319(d) for each day that Rueth was in violation of the CWA and the administrative compliance order.

After over a year of negotiations, the parties entered into a proposed consent decree, which the court then entered as a final judgment in January 1999. In the consent decree, Rueth agreed to perform a number of "milestone" tasks—such as excavating fill, sealing and raising storm sewers, and replacing wetland vegetation—by set deadlines. The agreement also required Rueth to pay a $23,000 civil penalty and set forth additional stipulated penalties that would result from failure to meet "any milestone" according to the specified timetable.

Rueth ultimately completed the wetland restoration at a cost of around $100,000 but failed to perform a number of the interim milestones in a timely fashion. Because of this failure, the government moved to enforce the stipulated-penalties provision of the consent decree, alleging that Rueth had "in very large part" disregarded his obligations under the agreement. For instance the government asserted that Rueth was 67 days late in paying the $23,500 penalty, 579 days late in excavating the fill and performing the storm-sewer tasks, and 158 days late in replacing the wetland vegetation. The government sought a separate stipulated penalty for each alleged violation of the agreement, resulting in a grand total of $6,757,500.

But before the district court could rule on the government's motion to enforce, Rueth moved under Fed. R. Civ. P. 60(b)(5) for modification or vacatur of the consent decree based on the Supreme Court's decision in *SWANCC.* Rueth claimed that *SWANCC,* which held that "navigable waters" as defined in the CWA does not extend to isolated intrastate waters solely because they are used as habitat by migratory birds, made "legal what the decree was designed to prevent," thus rendering it unenforceable. The district court disagreed, however. It concluded that *SWANCC* did not affect the validity of the decree because the government had not invoked the Migratory Bird Rule as a basis for its jurisdiction but sought rather "to regulate the [Castlewood] Site on the theory that it is an 'adjacent wetland.'" Then, the court made a factual finding that the Castlewood wetlands were "adjacent" to navigable waters because they have "an [effect] on flows to Dyer Ditch, and ultimately the Little Calumet River," which "is itself a navigable waterway." The court thus denied Rueth's Rule 60(b)(5) motion, granted the government's motion to enforce the consent decree, and imposed penalties in the amount of $4,018,500.

Rueth then moved under Rule 59(e) to alter or amend the judgment, claiming that there was no evidence whatsoever that the Castlewood wetlands were "adjacent" to a navigable waterway. He also claimed for the first time that the language of the consent decree did not allow for stipulated penalties to be separately imposed for each uncompleted or delayed "milestone" task. Though the district court denied the motion, it agreed with Rueth that the question of "adjacency" was still open to dispute and therefore vacated that portion of its

earlier order. Nonetheless, the court held that, even assuming the wetlands were isolated and not adjacent, Rueth was still not entitled to modification or vacatur of the consent decree because he waived his right to contest the government's regulatory jurisdiction by entering into the agreement. The court also upheld its award of stipulated penalties, and Rueth now appeals.

II. Discussion

Section 404(a) of the CWA grants the Corps authority to issue permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). "Navigable waters" is defined elsewhere in the Act as "the waters of the United States, including the territorial seas." *Id.* § 1362(7). The Corps has in turn defined "waters of the United States" to include "waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce." 40 C.F.R. § 230.3(s)(3) (2003).

In *SWANCC* the Supreme Court held that § 230.3(s)(3),[1] as clarified by the Migratory Bird Rule, 51 Fed. Reg. 41217 (1986), exceeded the authority granted to the Corps under § 404(a) of the Act. The Migratory Bird Rule, which the Corps

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1. Section 230.3(s)(3) was formerly codified at 33 C.F.R. § 328(a)(3) (1999). For simplicity we will cite to only § 230.3(s)(3) throughout this opinion.

issued in 1986 to clarify the reach of its jurisdiction, had provided that § 404(a) extends to intrastate waters that provide habitat for migratory birds. But the Court concluded that nothing in the text of the statute indicated any Congressional intent to extend the jurisdiction of the Corps to "ponds that are *not* adjacent to open water." *SWANCC*, 531 U.S. at 168. Instead, § 404(a)'s use of the word "navigable" had "the import of showing . . . what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Id.* at 172.

The question before us now is what effect, if any, *SWANCC* has on the validity of the consent decree in this case. In moving to modify or vacate the decree, Rueth relied on the third clause of Fed. R. Civ. P. 60(b)(5), which provides that a court may relieve a party from a final judgment if "it is no longer equitable that the judgment should have prospective application." To obtain relief under this provision, Rueth bears the burden of showing "that a significant change in circumstances warrants revision of the decree." *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 383 (1992). One instance where modification might be warranted is if the "statutory or decisional law has changed to make legal what the decree was designed to prevent." *Id.* at 388. Rueth contends that that is what *SWANCC* did here. Specifically, he asserts that *SWANCC* stripped the government of power to regulate the Castlewood wetlands because they are isolated and intrastate; therefore, the consent decree "is void *ab initio* and should be rescinded."

The government, not surprisingly, believes otherwise. Though the complaint did cite § 230.3(s)(3) as one basis for regulatory jurisdiction, the government claims that *SWANCC* is nonetheless irrelevant because the complaint did not specifically invoke the Migratory Bird Rule; instead, the alleged interstate-commerce nexus under § 230.3(s)(3) "rested on other important ecological functions of the wetland, such as water filtration, flood control, and wildlife habitat." Essentially, the government is urging us to give *SWANCC* its narrowest reading possible—that use as habitat by migratory birds is insufficient to bring purely isolated, intrastate ponds within the Corps' jurisdiction under the CWA. Or, in other words, *SWANCC* did nothing more than invalidate the Migratory Bird Rule. Section 230.3(s)(3), however, extends the Corps' jurisdiction to intrastate waters for reasons other than those having to do with use by migratory birds. For instance it includes waters that "are or could be used by interstate or foreign travelers for recreational or other purposes," waters "[f]rom which fish or shellfish are or could be taken and sold in interstate or foreign commerce," and waters that "are used or could be used for industrial purposes by industries in interstate commerce." The government claims that *SWANCC* left these provisions intact, whereas Rueth claims that *SWANCC* deprived the Corps of all power to regulate any intrastate water based on a nexus to interstate commerce. We conclude that they are both partly right—the government because *SWANCC* does not *expressly* make § 230.3(s)(3) illegal, and Rueth because his reading ultimately may be the only logical extension of the case. The Court's concern with the Migratory Bird Rule was that it conferred regulatory jurisdiction over waters that were not actually or potentially "navigable"; § 230.3(s)(3)

suffers from the same infirmity. For instance, that fish or shellfish can be taken from a water and sold in interstate commerce does not make that water any more "navigable" than it would be if it were frequented by migratory birds. The same holds true for intrastate waters that are used by interstate travelers or for industrial purposes by industries in interstate commerce.

But what effect *SWANCC* has on the Corps' jurisdiction under § 230.3(s)(3) is a question that we need not decide in this case. For it is clear that *SWANCC* did not affect the law regarding the government's alternative asserted basis for jurisdiction—adjacency under § 230.3(s)(7). The Corps' adjacency jurisdiction is well-established; it was upheld by the Supreme Court in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), and was reaffirmed in *SWANCC*. Recognizing this, Rueth offers a number of reasons why we should find that the Corps lacks adjacency jurisdiction here. First, he claims that the government has offered no evidence that the Castlewood wetlands are actually adjacent to navigable waters. But this is beside the point. The government never had to present such evidence because of the very fact that Rueth chose not to litigate the case. Rueth also points out that the district court's order denying his post-judgment motion "assumed" that the wetlands are isolated and not adjacent. He attaches too much significance to the court's assumption, however; the court proceeded on the theory that the wetlands are not adjacent only because it thought that Rueth would lose regardless. Finally, Rueth asserts that the wetlands' link to navigable waters is too attenuated to establish adjacency, alleging that the wetlands are "merely adjacent to a tertiary tributary of a navigable

water (adjacent to an unnamed tributary of Dyer Ditch which is a tributary of Hart Ditch which is a tributary of the Little Calumet River)." But this simply raises the question of what "adjacency" means, which *SWANCC* did not address at all. Rueth, moreover, waived his right to litigate the issue when he signed the consent decree. And further, it is not even apparent that the necessary contiguity to a navigable water is missing here. In *Riverside Bayview Homes,* the Court found mere surface runoff into nearby navigable waters to be a meaningful enough connection to give rise to the Corps' adjacency jurisdiction. 474 U.S. at 134. And recently, in *United States v. Deaton,* No. 02-1442, 2003 WL 21357305 (4th Cir. June 12, 2003), the Fourth Circuit upheld the Corps' exercise of adjacency jurisdiction over a parcel of land whose only connection to navigable waters was surface runoff that, after a "winding, thirty-two-mile path," emptied into the Chesapeake Bay.[2]

Despite the government's assertion of adjacency jurisdiction, Rueth seems to suggest that it would nonetheless be manifestly unfair to hold him to the terms of the consent

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2. As the court described it, the surface runoff drained into a roadside ditch, which in turn "drain[ed] into a culvert under Morris Leonard Road. On the other side of the road, the culvert drain[ed] into another ditch, known as the John Adkins Prong of Perdue Creek. Perdue Creek flows into Beaverdam Creek, a natural watercourse with several dams and ponds. Beaverdam Creek is a direct tributary of the Wicomico river, which is navigable. Beaverdam Creek empties into the Wicomico River about eight miles from the [defendants'] property. About twenty-five river miles further downstream, the Wicomico River flows into the Chesapeake Bay, a vast body of navigable water." *Id.,* 2003 WL 21357305, at *2.

decree because, at the time he settled the case, the law was well-established that the Corps *could* exercise jurisdiction over isolated intrastate waters. As Rueth points out, we told him in his first appeal that "nearly all wetlands fall within the jurisdiction of the CWA since one test for whether the wetland affects interstate commerce is whether migratory birds use the wetland." *Rueth I,* 13 F.3d at 231 (citing *Hoffman Homes, Inc. v. EPA,* 999 F.2d 256, 261 (7th Cir. 1993)). This statement is obviously no longer accurate after *SWANCC*, but regardless, we fail to see how it has any effect on the validity of the decree. Back when the EPA filed its complaint in 1996, Rueth was faced with a choice: he could either contest the government's jurisdiction or forego the costs and settle the case. Having reasonably concluded that his chances of succeeding on the jurisdictional challenge were not good, Rueth chose the latter course. The defendants in *SWANCC* chose the former. Now, Rueth seeks a free ride on the defendants' success in *SWANCC*, but the mere fact that the Supreme Court has cast doubt on one of the complaint's legal bases is not a ground on which to reopen the case. *See United States v. Krilich,* 303 F.3d 784, 792 (7th Cir. 2002) ("*Krilich III*"); *Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc.*, 131 F.3d 625, 628-29 (7th Cir. 1997). As we stated in *Krilich III,* which also involved a Rule 60(b)(5) motion to vacate a consent decree based on *SWANCC*,

> If a party believes that the waters at issue on his own property are not properly subject to the EPA's authority, whether under the rationale of *Hoffman Homes I, SWANCC* or under some other theory, he should not stipulate otherwise. But that is exactly what Krilich did, to his continued dismay.

> He expressly agreed that certain waters on his property constituted "waters of the United States," subject to regulation by the EPA. Like most parties that enter into a settlement or plea agreement, he presumably made a tactical decision that the terms of the Consent Decree were more favorable than the costs or risks of continued litigation. Accordingly, we conclude that *SWANCC* effected no relevant change in decisional law such that the district court should have modified the Consent Decree. Nor does *SWANCC* establish that the EPA's entry into and continued enforcement of the Consent Decree are *ultra vires* acts. "To hold that a clarification in the law automatically opens the door for relitigation of the merits of every affected consent decree would undermine the finality of such agreements and could serve as a disincentive to negotiation of settlements in . . . litigation."

Id. (quoting *Rufo,* 502 U.S. at 389).

Rueth spends much of his brief explaining how *Krilich III* is distinguishable from this case, but ultimately the distinction comes down to this: in *Krilich III* the defendant had conceded that there was some basis for the Corps' jurisdiction other than effect on interstate commerce, whereas here, Rueth conceded only that there was *some* basis for jurisdiction. But this is a distinction without a difference. Even assuming Rueth is right that *SWANCC* made illegal the government's assertion of jurisdiction under § 230(s)(3), if the case is reopened, the parties would still have to litigate whether the government has adjacency jurisdiction under

§ 230(s)(7). Six years ago, however, Rueth made the conscious decision, given the uncertainties of litigation, not to contest that issue. It would render the consent decree worthless to allow him to do so now. *See Rufo,* 502 U.S. at 389.[3]

So the district court was right not to modify or vacate the consent decree, but Rueth maintains that, even so, the court erred for several reasons in calculating the stipulated penalties. He first contends that the language of the decree does not support the imposition of cumulative stipulated penalties for each uncompleted "milestone" task; rather, according to Rueth's reading, the court should have imposed penalties based on *days* of noncompliance regardless of the number of violations, which would have reduced the total penalty to less than $1.5 million. Unfortunately for Rueth, he has waived this claim by raising it for the first time in his Rule 59(e) motion.[4] *Anderson v. Flexel, Inc.,* 47 F.3d 243, 247 (7th Cir. 1995). The government made clear in its motion to enforce that it was seeking a separate penalty for each violation of the decree. Yet in his opposition to the motion, Rueth did not argue that the stipulated-penalty provision was unclear on its face but asserted only that the penalties sought were "unconscionable and unenforceable" because they "bear

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3. Rueth might have an additional problem in that the relief he seeks—mainly, to be excused from paying the stipulated penalties that accrued as a result of his missing the deadlines set forth in the decree— may not be "prospective" in nature. Fed. R. Civ. P. 60(b)(5). There is no need for us to address this issue, however.

4. Notably, the district court did not even mention the claim in its order denying Rueth's motion.

no rational relationship to the potential harm which the plaintiff could have reasonably foreseen at the time it prepared the Consent Decree, and because the size of the penalties is grossly disproportionate to the degree of harm to the EPA or the environment resulting from the alleged delays." Not until his Rule 59(e) motion did Rueth raise any question regarding the proper construction of the stipulated-penalty provision. Further, even had Rueth not waived his claim, we find the government's interpretation of the decree to be the more reasonable one in any event. We agree with Rueth that the stipulated-penalty provision is facially ambiguous, so in order to resolve the ambiguity we must "look at the evil which the decree was designed to rectify." *Goluba v. Sch. Dist. of Ripon*, 45 F.3d 1035, 1038 (7th Cir. 1995) (quotations omitted). The clear intent of this decree was to require Rueth to restore the wetlands by performing six discrete milestone tasks in a relatively short (eleven-month) timeframe. Rueth knew that he had to comply with all six milestones in order to be in compliance with the CWA. Yet if he is right that the stipulated penalties accrue only by *day* of violation rather than per violation, there would be no incentive for him to complete any of the other five tasks if he is in violation of one. For this reason we cannot sustain Rueth's interpretation of the decree. To do so would render the number of violations irrelevant to the total penalty, which would in turn contravene the intent of the parties at the time the contract was made.

Rueth's next argument is that the district court erred by failing to hold a hearing to determine whether the EPA had consented to the delays in completing the storm-sewer tasks. The consent decree, however, has a *force majeure* provision,

which states that untimely performance would only be excused if Rueth provided a written request to the EPA. Rueth did not present any evidence that he did so. Thus, pursuant to the express terms of the decree, Rueth waived his right to obtain an extension of the deadlines, and so the court did not err in refusing to hear evidence on his claim that the decree had been orally modified. *See United States v. Alshabkhoun,* 277 F.3d 930, 936 (7th Cir. 2002); *United States v. Krilich,* 126 F.3d 1035, 1036-37 (7th Cir. 1997).

Rueth also contends that, before the court imposed the penalty, it should have considered the statutory criteria (such as seriousness of the violation and ability to pay) provided in the CWA. 33 U.S.C. § 1319(d). His argument is without support. Rueth negotiated and freely entered into the consent decree and is therefore bound by its terms, including those setting forth penalties, *see Alshabkhoun,* 277 F.3d at 935; the statutory factors no longer have any relevance. Likewise meritless is Rueth's argument that the penalties violate due process. Their apparent severity is due to the fact that Rueth was so negligent in complying with the decree that he himself negotiated; indeed, he was up to 579 days late in completing some of the milestone tasks. Given these circumstances we cannot say that the penalty amount is unreasonable, especially considering that it is but a small fraction of the maximum penalty that could have been imposed under the CWA. *See id.*

Appendix A

III. Conclusion

The district court did not err in denying Rule 60(b)(5) or 59(e) relief, and so the judgment is AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, HAMMOND DIVISION DATED FEBRUARY 21, 2002

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

No. 2:96 cv 540

UNITED STATES OF AMERICA

v.

RUETH DEVELOPMENT COMPANY,
AND HAROLD G. RUETH

ORDER

Presently before the court for resolution is "Defendants Motion to Alter or Amend Judgment," filed on October 11, 2001. Defendants ask this court to rule that (1) wetland 6 is an "isolated wetland" for purposes of the Clean Water Act ("CWA"), and (2) the Environmental Protection Agency ("EPA") "lacks jurisdiction to seek to enforce the Consent Decree." (Mot. at 1.) For the following reasons, the court VACATES IN PART its September 25, 2001 Order, and DENIES Defendants' Rule 59(e) motion.

Appendix B

I. BACKGROUND[1]

On November 1, 1996, EPA filed a civil complaint alleging that Defendants violated CWA, by causing unlawful dredging and filling at two parcels in the Castlewood Development, located in southeastern Dyer, Indiana ("Site" or "Castlewood"). Instead of proceeding to trial, Defendants and EPA settled the suit. The settlement was memorialized in a Consent Decree. Pursuant to Section XII of the Decree, the Department of Justice solicited public comment on the proposed Consent Decree. *See* Notice of Lodging of Consent Decree Pursuant to the Clean Water Act, 63 Fed. Reg. at 60,024 (Nov. 6, 1998). No comments were received. This court subsequently entered the Consent Decree on January 26, 1999. It required Defendants to (1) cease unlawful discharges; (2) restore the property's wetland in accordance with the "Castlewood Development Wetland Restoration Plan" within the agreed-to-timeline; and (3) "pay a civil penalty of $23,500, payable within thirty (30) days of the entry of this Consent Decree."[2]

On the belief Defendants had failed to fully perform their obligations, EPA subsequently moved to enforce the Consent Decree. *See* Robert V. Percival, *The Bounds of Consent: Consent Decrees, Settlements and Federal Environmental Policy Making*, 1987 U. CHI. LEGAL F. 327, *available at* WL 1987 UCHILF 327, at 4 ("Once the agreement is embodied in a consent decree, the government may seek relief for a

1. The factual and procedural background are more fully set forth in the court's September 25, 2001 Order.

2. Consent Decree at ¶ 17.

breach of the agreement directly from the court without filing a new lawsuit."). On September 25, 2001, this court granted EPA's motion to enforce the Consent Decree, and lodged a judgment in favor of EPA (and against Defendants) for stipulated penalties. On October 11, 2001, Defendants timely filed a motion pursuant to FED.R.CIV.P. 59(e), arguing the court erroneously awarded the judgment for stipulated penalties because (1) this court drew the wrong factual conclusion about the adjacency of wetland 6 (or, in the alternative, that the court should have conducted a hearing to receive ecological and hydological evidence on the issue), and (2) EPA has no jurisdiction to seek enforcement of the Consent Decree.

II. LEGAL STANDARD

A party may file a "motion to alter or amend a judgment" within ten days after the entry of such judgment. FED.R.CIV.P. 59(e). The motion must set forth, with "reasonable specification," the grounds upon which the moving party seeks relief. *Talano v. Northwestern Med. Faculty Fdn., Inc.*, 273 F.3d 757, 760 (7th Cir.2001) (mandating a minimum of specificity to trigger FED.R.CIV.P. 59(e) review); *Martinez v. Trainor*, 556 F.2d 818, 819-20 (7th Cir.1977). "A party may not introduce evidence or make arguments in a Rule 59 motion that could or should have been presented to the court prior to judgment." *United States v. 47 West 644 Route 38, Maple Park, Ill.*, 190 F.3d 781, 783 (7th Cir.1999); *see also Caisse Nationale De Credit Agricole v. CBI Indus., Inc.*, 90 F.3d 1264, 1270 (7th Cir.1996); *LB Credit Corp. v. Resolution Trust Corp.*, 49 F.3d 1263, 1267 (7th Cir.1995). "A Rule 59(e) motion may only be granted if there has been a mistake of

law or fact or if there is newly discovered evidence not previously available." *Gendron v. United States*, 154 F.3d 672, 675 (7th Cir.1998); *see Figgie Int'l. Inc. v. Miller*, 966 F.2d 1178, 1180 (7th Cir.1992).

III. DEFENDANTS' CONTENTIONS

In their jointly-filed motion, Defendants make two arguments. First, they assert the court prematurely concluded wetland 6 is an "adjacent wetland" and subject to the EPA's regulatory jurisdiction under the CWA. According to Defendants, the court should instead find that the Site is situated upon an "isolated wetland" and therefore beyond the regulatory reach of the CWA. Alternatively, Defendants argue this court should receive expert ecological and hydrological testimony on the issue of whether the Site sits upon an "isolated wetland." Under the circumstances, a Rule 59(e) motion appears to be the proper procedural device to pursue the remedy Defendants seek. Second, Defendants argue that EPA lacks jurisdiction to seek enforcement of the Consent Decree entered by this court. Defendants maintain that intervening United States Supreme Court case law has stripped EPA of regulatory jurisdiction over the Site. According to Defendants, EPA is therefore powerless to petition this court to assess stipulated penalties as provided in the Consent Decree. The court will address each argument in turn.

Appendix B

A. Wetland 6 is an "isolated wetland"

First, Defendants maintain the Site does not contain an "adjacent wetland." *See* 33 C.F.R. § 328.3(b) (defining "wetlands") & (c) (defining "adjacent"). As previously stated, the court, in its September 25, 2001 order, concluded otherwise. In so doing, the court referred to EPA's memorandum in support of its motion to enforce the consent decree, particularly Exhibit A thereto, which purports to be "Consent Decree, *United States v. Rueth Development Co.*, Civil Action Number 2:96CV-540-JM, entered January 26, 1999." (Mem. in Supp. of Motion to Enforce Consent Decree, at Index to Exhibits (emphasis in original) ("Memo In Support")) According to this Index of Exhibits, Tab 1 contained the Consent Decree, *and only the Consent Decree.* The court then reviewed the obligations Defendants had agreed to undertake as a result of the Consent Decree. One provision required that "Defendants shall conduct and complete the 'Castlewood Development Wetland Restoration Plan' which is attached to this Consent Decree as Exhibit 1." (Consent Decree at ¶ 16.) The parties also agreed "[t]he 'Castlewood Development Wetland Restoration Plan' shall be an enforceable obligation of this Consent Decree." (*Id.* at ¶ 16.c.) The court, eager to peruse the contents of the "Castlewood Development Wetland Restoration Plan," turned to the rear of Tab 1. Two pages after the signature page for the presiding district judge (*i.e.*, the undersigned) appears a page with the following printed upon it: EXHIBIT 1. (emphasis in original [hereinafter "Tab 1/Exhibit 1"]) The court understood this page to signal the beginning of the "Castlewood Development Wetland Restoration Plan." In other words, it was assumed (albeit subliminally) that on

the next page would commence the contents of the "Castlewood Development Wetland Restoration Plan."

The first page of *what is* Tab 1/Exhibit 1 of EPA's Memo in Support (and *what simultaneously purports to be* the "Castlewood Development Wetland Restoration Plan") contains the following statement: "Castlewood is an existing residential subdivision located in Dyer, Indiana, south of U.S. 30 and just west of the Schereville town line. . . . *Within this proposed development area is a wetland encompassing approximately 7.3 acres.* The existence of this wetland necessitates this assessment." (emphasis added) The fourth paragraph on that first page states: "The proposed development area was naturally undulating but has been modified by past sand and/or gravel mining activities. Therefore, some areas are scraped and others contain indiscriminate spoil piles. *In the center of the property is a large wetland of about 7.3 acres.*" (emphasis added) The court further proceeded to study the "exhibit" and noted the following two sentences:

> The topographic map of the area (St.John, Indiana) shows that the natural drainage is to the north to Dyer Ditch, then to Hart Ditch and the Little Calumet River. Shallow wetlands existed along this natural drainage, but the spoil piles interrupted that water flow and dammed the valley to create the deeper wetland.

(Tab 1/Exhibit 1 at 10.) Continuing with its review of the document, the court took special note of two portions printed within the section entitled "Discussion and

Recommendations." First, this section provided the following conclusion: "The wetland on the Castlewood property provides habitat for numerous wildlife species. *It also has an affect on flows to Dyer Ditch, and ultimately the Little Calumet River.*" (Tab 1/Exhibit 1 at 15 (emphasis added).) The "Discussion and Recommendations" section further determined that "[t]he Castlewood wetland is under the jurisdiction of the U.S. Army Corps of Engineers under Section 404 of the Clean Water Act of 1972." (*Id.* at 16.) This document clearly indicates that one wetland is present on the Site, water molecules that collect in the wetland ultimately come in contact with water molecules from the Little Calumet River,[3] and that the wetland is subject to federal regulatory jurisdiction pursuant to CWA § 404.

Armed with the ecological and hydological conclusions embodied in Tab 1/Exhibit 1, the court then referred back to the body of the Consent Decree proper. Since the court was lead to believe that the contents of Tab 1/Exhibit 1 were the "Castlewood Development Wetland Restoration Plan," (Consent Decree at 3.), and that the "Castlewood Development Wetland Restoration Plan," is "an enforceable obligation," (*id.* at ¶ 16.c.), this court concluded that the set of ecological and hyrdological propositions contained in Tab 1/Exhibit 1 were previously agreed upon. Proceeding under the assumption EPA and Defendants had both subscribed to these ecological and hydrological findings, the court found that no factual dispute could possibly exist on issues relating to the wetland. Based upon what the court perceived to be

3. The court took judicial notice of the fact that the Little Calumet River is a navigable waterway. *See* FED.R.EVID. 201(c) ("A court may take judicial notice, whether requested or not.").

mutual understandings, it was concluded that the wetland present upon the Site is an "adjacent" (and *not* an isolated) wetland for purposes of CWA. (*See* Sept. 25, 2001 Order at 4-5 (citing Tab 1/Exhibit 1).) This precluded Defendants from establishing what they believe is vital to their case, namely that the wetland that is the subject of this litigation is not the kind of ecological system that is within the regulatory purview of CWA.

In Defendants' memorandum in support of their Rule 59(e) motion, they inform the court that it "misinterpreted Exhibit 1 to the Consent Decree, and ignored disputed issues of fact." (Mem. in Supp. of Mot. at 4.) Neither of these characterizations is entirely true, but prompted the court to investigate the source of Defendants' discontent. First, the court did not ignore a disputed factual question because, as mentioned *supra*, based upon the documents the parties presented, there appeared to be no material fact in dispute. Second, the court did not misinterpret "Exhibit 1 to the Consent Decree." The court merely arrived at its decision by reference to the documents submitted by the parties, working under the assumption the documents were indeed what they purported to be. In fact, upon (another) review of that document, it is clear the court *properly* interpreted its contents.

The element of truth to which the court referred comes in when a subsequent review of EPA's submission reveals that it perpetrated a "bait and switch" of sorts. The document upon which this court so heavily relied, "Tab 1/Exhibit 1" is not what it purports to be. In the place where the "Castlewood Development Wetland Restoration Plan" was supposed to

be (*i.e.*, right after the page with the symbols "EXHIBIT 1" printed upon it) was a report prepared by Elizabeth Secora McCloskey ("McCloskey Report").[4] The *bona fide* "Castlewood Development Wetland Restoration Plan" appears nowhere in the EPA's package of exhibits annexed to its Memo in Support of the Motion to Enforce the Decree. That is no small accomplishment: EPA annexed seventeen exhibits, not one of them was the "Castlewood Development Wetland Restoration Plan." Failing to include the "Castlewood Development Wetland Restoration Plan" as the real Exhibit 1 to the Consent Decree was the "bait" half of the operation, inserting the McCloskey Report, was the "switch." Surprisingly, in the ten months and roughly half-dozen filings between EPA's tendering of the "bait and switch" exhibit and this court's September 25, 2001 Order, Defendants failed to provide a true, accurate, and complete copy of the Consent Decree (and proper exhibits thereto), and/or bring the court's attention to the fact that the Consent Decree annexed to EPA's memorandum is *very misleading.* In its response to this Rule 59(e) motion, EPA recognizes this mistake. (Resp. at 5, fn.2 ("[The McCloskey Report]

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4. Defendants drove this point home in their memorandum.

> The Consent Decree in this case is attached as Exhibit 1 to the Plaintiff's "Memorandum in Support of United States' Motion to Enforce the Consent Decree." Exhibit 1 to the Decree, *attached by the government*, is entitled "Environmental Assessment, Castlewood Edition, Dyer, Indiana," dated February 21, 1990, prepared by Elizabeth Secora McCloskey.

(Mem. in Supp. of Rule 59(e) Mot. at 3 (emphasis added).)

was incorrectly attached as Exhibit 1 to the Consent Decree . . . Ms. McCloskey's report should have been attached as Exhibit 1 to the Declaration of Gregory T. Carlson.").)

As a result, Defendants have clearly met their burden of demonstrating to the court that the parties never achieved mutual assent on the contents of the McCloskey Report, which undergirds this court's previous finding that the wetland at issue in this litigation is an "adjacent wetland" as that phrase is used in CWA jurisprudence. This court, therefore, VACATES the portion of its September 25, 2001 Order finding of an "adjacent wetland" upon the Site.

B. Whether EPA lacks jurisdiction to seek to enforce the Consent Decree

Even assuming Defendants can show that wetland 6 is an "isolated wetland" for purposes of CWA, the inquiry does not end. Such a finding does not automatically undercut the validity of the Consent Decree, or the supplemental judgment resulting from this court's grant of EPA's motion to enforce the Consent Decree. Rather, Defendants must now demonstrate that, as a result of wetland 6 being an "isolated wetland," EPA "lacks jurisdiction to seek to enforce the Consent Decree." (Def. Mem. in Supp. of Mot. at 19.) Defendants jurisdictional argument flows from the United States Supreme Court decision in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 121 S.Ct. 675 (2001) (5-4 decision) ("*SWANCC*").

In *SWANCC*, a group of suburban Chicago municipalities decided to purchase some real property located in Cook and

Kane counties. *See id.* at 678. The owner at the time, Chicago Gravel Company, had previously used the parcel for sand and gravel pit mining operations, but ceased those operations there about 1960. *See id.* In the intervening decades, "the old mining site eventually gave way to a successful stage forest, with its remnant excavation trenches evolving into a scattering of permanent and seasonal ponds of varying size and depth." *Id.* (parentheticals omitted). As a result of the presence of these bodies of water, the defendants contacted the Army Corps of Engineers ("ACOE") and inquired whether these man-made bodies were subject to federal regulation under CWA, and if so, whether "a federal landfill permit was required." *Id.* ACOE eventually asserted jurisdiction because migratory birds were observed at the site. *See id.* In common parlance, this is the Migratory Bird Rule. *See* 51 Fed. Reg. 41,217. Notwithstanding its diligent attempts to secure the applicable CWA permit, ACOE refused to grant one. The municipalities then filed suit in district court, pursuant to the Administrative Procedures Act, 5 U.S.C. § 701 *et seq.*, "challenging both the [ACOE] jurisdiction over the site and the merits of its denial of the . . . permit." *Id.* at 679. ACOE secured a summary judgment in its favor on the jurisdictional issue and the municipalities abandoned their challenge to the denial of the permit. *See id.* The Seventh Circuit affirmed, rejecting the position that ACOE "had exceeded their statutory authority in interpreting the CWA to cover nonnavigable, isolated, intrastate waters based upon the presence of migratory birds." *Id.* The Supreme Court granted *certiorari.*

The Supreme Court, in its five-to-four decision, reversed the Seventh Circuit. The Court determined the promulgation

of the Migratory Bird Rule, was beyond the authority Congress had bestowed upon ACOE. *See id.* at 684. Since the Migratory Bird Rule was the sole basis upon which ACOE asserted regulatory jurisdiction over the real property at issue, the Court ruled the municipalities were entitled to judgment as a matter of law.

Defendants argument based on *SWANCC* is fairly straightforward. They assert that just like the real property in *SWANCC*, the Site's wetland 6 is not an "adjacent wetland," and therefore no CWA jurisdiction exists. According to Defendants, this means the court should alter the supplemental judgment entered in this case on September 25, 2001. A fair reading of *SWANCC*, however, indicates it is sufficiently distinguishable, and does not form a basis for Rule 59(e) relief.

There is a fatal difference in procedural posture. When faced with the prospect of regulation under CWA § 404(a), the municipalities in *SWANCC* could have acquiesced, settled with ACOE, and developed the real property consistent with ACOE specifications. Instead, the municipalities made a rational determination that the expected benefits derived from fully litigating the jurisdictional issue outweighed the expected detriment. From the municipalities' perspective, it "made sense" to litigate rather than forfeit the right to contest the jurisdictional issue and come to a negotiated settlement. *See* Percival, *supra*, at *8 ("Parties ordinarily can be expected to settle a lawsuit only if the terms of the settlement are more favorable than the expected outcome of a trial discounted by the additional costs of continuing the litigation." (citing William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & Econ. 61, 66-69 (1971))).

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Defendants charted a different course, which naturally, yielded different results. To fully appreciate the difference in procedural posture between *SWANCC* and this case requires a return to January 1991. At that time ACOE notified Defendants "that its activities at the Castlewood site were resulting in the unauthorized discharge of fill materials into wetlands." *Rueth v. EPA*, Civ. A. No. H91-152, 1992 WL 560944 at *1 (N.D.Ind. Nov. 24, 1992) (Lozano, J.), *aff'd*, 13 F.3d 227 (7th Cir.1993). Three months later, EPA issued an administrative order, indicating Defendants violated the anti-dumping provisions of the CWA. EPA also mandated a restoration of the wetland to its previous condition. *See id.* Less than one month after the administrative order issued, Defendants filed suit requesting a declaration that ACOE "does not have jurisdiction over the property at issue." *Id.* Judge Lozano dismissed the action for lack of subject matter jurisdiction, holding that administrative agency orders "are not reviewable until the enforcement stage." *Id.* at *2. Judge Lozano also provided guidance on the availability of a federal judicial forum.

> Developers, when confronted with the [ACOE] preliminary determination of jurisdiction over land, may react in two ways. They may submit to the administrative permitting process and subsequently, through the Administrative Procedure Act, 5 U.S.C. § 704, obtain judicial review of a permitting decision (a final agency action) under the arbitrary and capricious standard. Or, they may ignore the agency and risk compliance orders followed by enforcement penalty proceedings, and obtain *de novo* review

> in district court. Either of these two options, in any event, affords the developer his or her day in court.

Id. at *3 (citation to *Banks v. Page*, 768 F.Supp. 809 (S.D.Fla. 1991) omitted). Dissatisfied with this outcome, Defendants appealed, and (as indicated by the citation to the district court opinion, *supra*) the Seventh Circuit affirmed. In so doing, the panel made some observations bearing on the issue presently before this court.

> We acknowledge that our holding places Rueth somewhat in limbo until such time as the EPA seeks to enforce the compliance order or assess administrative penalties. In the interim, we are cognizant of the fact that Rueth might conceivably encounter some problems, such as securing bank loans or obtaining title insurance. Responsibility for this predicament does not fall entirely on the EPA and the [ACOE], as any reasonable and experienced developer such as Rueth should have known that the wetlands were potentially subject to regulation. Perhaps Rueth is in its present predicament because it attempted to short cut and take an end-run around the permit requirement. Indeed, the prudent course for any developer is to secure the necessary permits prior to commencing construction. This is what the Clean Water Act mandates in [33 U.S.C.] § 1344(a) when it requires developers to obtain permits prior to filling wetlands. Of course, Rueth now argues that it had no idea the wetlands at the Castlewood

> development were "waters of the United States." As our decision in *Hoffman Homes, Inc. v. EPA*, 999 F.2d 256, 261 (7th Cir.1993), makes clear, however, nearly all wetlands fall within the jurisdiction of the CWA since one test for whether the wetland affects interstate commerce is whether migratory birds use the wetland. *Id.* Decisions such as *Hoffman Homes*, give full effect to Congress's intent to make the Clean Water Act as far-reaching as the Commerce Clause permits. On the other hand, it is not inconceivable that the EPA or the [ACOE] might completely overextend their authority. In such a case, we suggest to those agencies that we will not hesitate to intervene in pre-enforcement activity, but this is not the case as we are of the opinion that the wetland at issue falls under the broad definition of "waters of the United States" in *Hoffman Homes*.

Rueth, 13 F.3d at 230-31 (dicta). Based upon this round of litigation, a rational business manager in Defendants' position would have impounded the following information into the operating calculus of the firm: (1) that Defendants would have a federal judicial forum available to contest the jurisdictional issue (either offensively, in a suit against EPA pursuant to the Administrative Procedures Act;[5] or defensively, in an action brought by EPA against Defendants for violations of CWA); and (2) that based upon the law of this circuit, Defendants' chances of succeeding with the jurisdictional challenge were slim.

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5. This was the procedural device employed by the municipalities in *SWANCC*. 121 S.Ct. at 679.

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On November 1, 1996, EPA filed a civil complaint alleging Defendants violated CWA sections 301(a) and 404. At that moment, Defendants were faced with a choice. Defendants could have contested the EPA's regulatory jurisdiction, thereby encountering certain risks. First, based upon the Seventh Circuit's dicta, Defendants chances of succeeding were not good. Second, the costs (in attorneys' fees, expert witnesses, discovery, etc.) of pursuing the jurisdictional issue would be substantial. Last, contesting EPA's jurisdiction could have thwarted attempts to negotiate a settlement. The municipalities in *SWANCC* chose this risky route, whereas Defendants, approached the problem in a more risk averse manner. They agreed to settle the litigation (and have that settlement embodied in the Consent Decree).[6]

6. Presumably, Defendants could have reserved the right to contest EPA's jurisdiction over the Site. Alternatively, Defendants could have negotiated a provision in the Consent Decree allocating rights and obligations of the parties in the event case law in this circuit changed. This latter approach was taken by the developer in *United States v. Krilich*, 152 F.Supp.2d 983 (N.D.Ill. 2001), *appeal docketed*, No. 01-2746 (7th Cir. July 3, 2001). In the *Krilich* consent decree, the parties made the following agreement:

> 20A. The Defendants shall continue to treat wetland and open water areas depicted on Exhibit 1 as waters of the United States until the mandate issues in *Hoffman Homes, Inc. v. EPA*, 961 F.2d 1310 (7th Cir.1992) and until proceedings related to any appeal, petition for certiorari, or remand are completed. Following completion of these proceedings, unless pertinent portions of the Seventh Circuit's April 20, 1992 decision are reversed, Exhibit 1 areas W2A, W2B, W3, W5B, and W9 shall be excluded from the obligations imposed in Paragraph 17.

Id. at 990.

This decision is perfectly understandable. Defendants felt the jurisdictional issue was a "loser,"[7] and the costs of what appeared to be protracted litigation would be prohibitive. *Cf.* Percival, *supra* at *2 ("Joint gains from settlement are possible because settlements save the parties the expense of further litigation."). Defendants decision, however, was not without costs of its own. First (and fatally for purposes of this motion), Defendants *waived* certain rights. *See generally id.* at *2 ("Each party gives up something it might have won had the litigation continued."). "Waiver is the intentional relinquishment or abandonment of a known right." *United States v. Williams*, 272 F.3d 845, 854 (7th Cir. 2001); *see also United States v. Olano*, 507 U.S. 725, 733 (1993). By assenting to settlement in this action,[8] Defendants waived, for example, the right to contest the EPA's regulatory jurisdiction, which would have been an element of the EPA's substantive claim. *See United States v. Krilich*, 209 F.3d 968, 972 (7th Cir. 2000) ("[T]he interstate connection, *i.e.* that the waters involved were 'waters of the United States,' is merely an element of the United States' Clean Water Act case under section 301."), *cert. denied*, 531 U.S. 992 (2000); *see also United States v. Wilson*, 133 F.3d 251, 264 (4th Cir. 1997) (indicating proof of interstate nexus is an element of criminal liability under CWA); *United States v. Ahmad*, 101 F.3d 386, 391 (5th Cir. 1996) (recognizing the existence of "purely jurisdictional elements").

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7. *But see SWANCC*, 121 S.Ct. at 684 (reversing Seventh Circuit).

8. *See* Consent Decree at ¶ 5 ("This Consent Decree shall constitute a complete and final settlement of all civil claims against the Defendants in connection with Defendants' alleged violations of the CWA as set forth in the Complaint.").

Moreover, a consent decree "is an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is *subject to the rules generally applicable to other judgments and decrees.*" *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 378 (1992) (emphasis added). In this case, EPA moved to enforce the judgment entered by way of the Consent Decree. As a result of EPA's motion, this court lodged a supplemental judgment in favor of EPA. Defendants, in their Rule 59(e) motion, seek to alter the latter of the two judgments entered in this cause, but since the latter judgment is merely the result of exercising rights contained in the earlier judgment, Defendants must also attack the former judgment (or more specifically, rights therein allocated to EPA), which is exactly how Defendants cast their argument. (*See* Rule 59(e) Mot. at 1 (EPA "lacks jurisdiction to *seek to enforce the Consent Decree.*" (emphasis added)).) Even assuming the wetland at issue in this litigation is beyond the regulatory reach of EPA (on account of its ecological "isolation"),[9] and further assuming EPA has no power to enter into the agreement that eventually was entered as a judgment by this court, Defendants still can not obtain Rule 59(e) relief because "[t]he fact that a party to a consent judgment lacked authority to consent (as defendants contend is true of the [EPA] in light of *SWANCC*) does not void the judgment itself." *Krilich*, 152 F.Supp.2d at 991 (citations omitted). "A judgment is void if it is without subject matter jurisdiction, there was no personal jurisdiction over a party, or the judgment was entered without due process of law." *Id.* On this Rule 59(e) motion, Defendants contest not the subject matter jurisdiction of this court, but rather

9. *But see SWANCC*, 121 S.Ct. at 693-96 (Stevens, J., dissenting) (arguing migratory birds act as the "adjacency factor" linking otherwise isolated wetlands).

EPA's regulatory reach, a contention which does not render void the judgments entered in this action. The Consent Decree remains, therefore, what it has always been: a valid and enforceable judgment. (*See* Consent Decree at ¶ 37 ("Upon its entry by this Court, this Consent Decree shall have the force and effect of a final judgment.").)

One can think of this issue another way. EPA, at this stage of the litigation, does not seek to exercise regulatory jurisdiction over the Site. They are merely asserting their rights as a creditor to a judgment previously entered in the form of a Consent Decree. The immediate source of EPA's authority to obtain stipulated penalties in this case is the judgment of this district court entered on January 26, 1999.

C. Other Issues

Defendants make several additional arguments in their memorandum in support of the Rule 59(e) motion that require a moment to address. First, they assert "[t]here exists a genuine issue of fact as to whether [EPA] consented to delays in the storm water-related tasks." (Mem. at 9.) Assuming *arguendo*, any factual dispute is not material to the matters before the court. In the Consent Decree, the parties specifically provided for the situations where EPA would consent to extending deadlines and the method by which Defendants could obtain consent from EPA.

> b. If the required task has not been completed, Defendants shall submit a written notice in accordance with the requirements of Section VIII (Force Majeure) below. Failure to submit such

> written notice *shall constitute a waiver of Defendants right to obtain an extension of time* under the provisions of Section VIII (Force Majeure) below. Submission of any notice shall not relieve Defendants of their obligation to comply with any requirement of this Consent Decree.

(Consent Decree at ¶ 23.b. (emphasis added)) The governing provision of the Force Majeure provides as follows:

> 24. If an event occurs which causes or may cause Defendants to fail to comply fully and timely with any requirement of this Consent Decree, Defendants shall notify in writing EPA and the Department of Justice, at the addresses stated in Section X (Addresses for Submissions) below, within fourteen days (14) of the date when Defendants first learned of the violation, or within fourteen days (14) of the date when Defendants should have known of the event by the exercise of due diligence. The notice shall describe in detail. . . .

(*Id.* at ¶ 24.)

> 25. If the parties to this Consent Decree agree that the violation of a provision of this Consent Decree has been or will be caused by circumstances beyond the control of the Defendants . . . the time for performance of such provision shall be extended in writing by EPA. . . .

(*Id.* at 25.) Since Defendants have not produced evidence tending to prove they obtained EPA's consent in accordance with the provisions of the Consent Decree, this theory of Rule 59(e) relief fails. *Cf. United States v. A & A Farms*, No. 01-1380, slip op. at 8 (7th Cir. Jan. 18, 2002) ("This provision, however, required A & A to notify the government in writing of the alleged Force Majeure event in order to excuse a deadline. Because A & A failed to do so, A & A cannot now claim that compliance with the schedule was not possible." (citation omitted)).

Next, Defendants insist "[t]he court failed to consider statutory criteria in calculating penalties." (Mem. at 11.) According to Defendants, imposition of stipulated penalties pursuant to a consent decree requires the court to utilize statutory damages criteria. This position has no support in the law of this circuit. In fact, a panel of the Seventh Circuit recently affirmed an approach to stipulated penalties similar to the one undertaken in this case. The panel wrote:

> [In] *United States v. Krilich*, 126 F.3d 1035 (7th Cir.1997), . . . we upheld the imposition of over $1 million in stipulated penalties. Krilich, a property owner, entered into a consent decree to settle the government's Clean Water Act claims. *Krilich*, 126 F.3d at 1036. In the decree, Krilich promised to restore the subject wetlands according to a schedule. Krilich missed the scheduled deadlines and the government moved to enforce the decree's stipulated penalties provision. *Id.* The district court granted the motion and we affirmed. In so doing, we noted that Krilich

> had negotiated the decree, entered into it freely, and never properly modified any of the deadlines. *Id.* at 1037. Accordingly, Krilich was bound to pay the stipulated penalties set forth in the consent decree. We believe that the result in *Krilich* is warranted in the instant case.

A&A Farms, at 7. Nothing in the text of *A&A Farms* (or, by implication, *Krilich*) suggests the court must incorporate statutory considerations into the calculation of stipulated penalties, especially if the parties did not make the applicable reference. Introducing factors not previously agreed upon by the parties into the calculation of stipulated penalties would render nugatory the "stipulated" part of the doctrine. Instead, this court analyzed the stipulated penalties framework the parties agreed upon in the Consent Decree, (*See* Consent Decree at ¶¶ 19-22.), and found it reasonable in light of the CWA. *Accord A&A Farms*, at 5 (noting stipulated penalties are enforceable as long as the provisions in the consent decree establishing them are reasonable); *South Suburban Hous. Ctr. v. Berry*, 186 F.3d 851, 856 (7th Cir. 1999). Then, the court applied the penalty provisions in the Consent Decree to the circumstances of this case. Since the text of the Consent Decree does not signal this court to incorporate statutory criteria into the penalty-imposing calculus, the court did not do so.

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IV. CONCLUSION

For the foregoing reasons, the September 25, 2001 Order in this action is hereby VACATED insofar as it concludes wetland 6 is an "adjacent wetland" as that term is used in CWA jurisprudence. Since this factual determination does not impact the judgment embodied in the Consent Decree or the September 25, 2001 judgment enforcing it, "Defendants' Motion to Alter or Amend Judgment," is hereby DENIED.

SO ORDERED.

s/ [illegible]
JUDGE, UNITED STATES
DISTRICT COURT

Enter: February 21st 2002

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, HAMMOND DIVISION ENTERED SEPTEMBER 25, 2001

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

No. 2:96 CV 540

UNITED STATES OF AMERICA

v.

RUETH DEVELOPMENT COMPANY, and
HAROLD G. RUETH

ORDER

The United States of America, acting on behalf of the Environmental Protection Agency ("EPA"), moves to enforce a consent decree between EPA and Rueth Development Company and Harold G. Rueth ("Defendants"), entered with this court on January 26, 1999 ("Consent Decree"). Defendants have filed cross-motions for dispute resolution and modification. Since the court feels the parties' briefs are adequate to address all the issues presented, a hearing is not necessary and therefore Defendants' "Request for Evidentiary Hearing on Pending Motions" is **DENIED**. For the reasons that follow, the court **GRANTS** the EPA's motion to enforce the Consent Decree and awards stipulated penalties in the amount of $4,018,500 and **ORDERS** Defendants to complete excavation as set forth in the Consent Decree within ninety

(90) days of entry of this Order. The court also **GRANTS** Defendants' cross-motion for dispute resolution insofar as it relates to wetland delineation and annual reporting and **DENIES** Defendants' motion to modify the Consent Decree. Since the court has disposed of all issues without reference to Exhibit A to Defendants' Petition for Modification, EPA's "Motion to Strike" is **DENIED AS MOOT.**

BACKGROUND

On November 1, 1996, EPA filed a civil complaint alleging that Defendants violated sections 301(a)[1] and 404[2] of the Clean Water Act ("CWA"), by causing unlawful dredging and filling at two parcels in the Castlewood Development, located in southeastern Dyer, Indiana (the "Site"). Prior to trial, Defendants and EPA agreed to settle the case.[3] In accordance with Section XII of the

1. "Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a).

2. "The Secretary may issue permits . . . for the discharge of dredged or fill materials . . . at specific disposal sites." 33 U.S.C. § 1344(a).

3. Defendants' counsel signed the Decree on August 3, 1998. The government had three signatories: David Ullrich, Acting EPA Administrator for Region 5 (signed the Decree on September 10, 1998); Steven Herman, EPA Assistant Administrator for Enforcement and Compliance Assurance (September 30, 1998); and Steven Rusak, Department of Justice's Environmental & Natural Resources Division (October 21, 1998).

Decree,[4] the Department of Justice solicited public comment on the proposed Consent Decree. *See* Notice of Lodging of Consent Decree Pursuant to the Clean Water Act, 63 Fed. Reg. at 60,024 (Nov. 6, 1998). The United States received no public comments.[5] The court subsequently entered the Consent Decree on January 26, 1999. It required the Defendants to (1) cease unlawful discharges;[6] (2) restore the property's wetlands in accordance with the "Castlewood Development Wetland Restoration Plan" within the agreed-to timeline;[7] and (3) "pay a civil penalty of $23,500, payable within thirty (30) days of the entry of this Consent Decree."[8] This court retained jurisdiction over the action to enforce, modify, construe and resolve disputes arising out of the Consent Decree.

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4. Section XII of the Consent Decree provides:

> 34. Defendants consent to the entry of this Consent Decree without further notice. The parties agree that after the lodging of this Consent Decree, and prior to its entry, the United states shall, pursuant to 28 C.F.R. § 50.7, publish a public notice of this Consent Decree and provide an opportunity for public comments. The United States reserves the right to withhold or withdraw its consent to entry of this Consent Decree based upon such public comments.

5. The public comment period was thirty days from the date of publication in the Federal Register. *See id.*

6. *See* Consent Decree, at ¶ 15.

7. *See id.* at Ex.1 (Plan) & ¶ 16 (Timeline).

8. *Id.* at ¶ 17.

Now, EPA moves to enforce the Consent Decree. It seeks an order requiring Defendants to complete excavation as agreed in the Consent Decree, as well as stipulated penalties and other appropriate relief. Defendants oppose the United States' motion and themselves move for dispute resolution and modification under the Decree on various grounds.

JURISDICTION

Defendants urge modification of the Consent Decree because "the U.S. EPA and/or U.S. Army Corps of Engineers has lost jurisdiction of the property which is the subject of the Consent Decree." (Def. Pet. for Modification of Consent Decree, at 2.) "[M]odification of a consent decree may be warranted when the . . . decisional law has changed to make legal what the decree was designed to prevent." *Rufo v. Inmates of Suffolk County Jail,* 502 U.S. 367, 388 (1992). By way of "decisional law," Defendants direct the court's attention to the Supreme Court's decision in *Solid Waste Agency v. Army Corps of Engineers,* 121 S.Ct. 675 (2001) ("*SWANCC*"). Since *SWANCC* has narrowed the Army Corps of Engineers' regulatory jurisdiction under the CWA, the court first addresses this part of Defendants' motion.

In *SWANCC,* the Army Corps of Engineers had sought to regulate abandoned sand and gravel pits which had evolved into a scattering of permanent and seasonal ponds. *See id.* at 678. They based jurisdiction solely on the existence of migratory bird species observed at the site (a.k.a. The Migratory Bird Rule). *See id.* The Supreme Court held this exercise of regulatory jurisdiction by virtue of the

Migratory Bird Rule, "exceeds the authority granted to [the Army Corps of Engineers] under § 404(a) of the CWA." *Id.* at 684.

In light of *SWANCC,* Defendants urge this court to rule that the Army Corps of Engineers has no power to regulate the Site. There are two fundamental factual differences between Defendants' Site and the real property at issue in *SWANCC.* First, Defendants' Site is home to a natural wetland which flows into connecting bodies of water. (*See* Consent Decree, at Ex. 1.) In *SWANCC,* the bodies of water at issue were isolated mining pits and ponds. In other words, a molecule of water residing in one of these pits or ponds could not mix with molecules from other bodies of water. At Defendants' Site, however, water molecules currently present in the wetlands will inevitably flow towards and mix with water from connecting bodies, including the Little Calumet River. Secondly, the "Migratory Bird Rule" was the *sole* basis of regulatory jurisdiction asserted by the Army Corps of Engineers in *SWANCC.* With respect to Defendants' Site, however, the government has never invoked the Migratory Bird Rule. Instead, the government seeks to regulate the Site on the theory that it is an "adjacent wetland."

Under § 404(a) of the CWA, the Army Corps of Engineers has the power to regulate wetlands adjacent to navigable waterways. *See United States v. Riverside Bayview Homes,* 106 S.Ct. 455 (1985). The holding in *Riverside Bayview Homes,* as reaffirmed in *SWANCC,* turns on "the significant nexus between the wetlands and 'navigable waters.'" *SWANCC,* 121 S.Ct. at 680. Since the *Riverside*

Bayview Homes standard remains applicable to wetlands, the court considers whether the wetland on Defendants' Site has a "significant nexus" to a navigable waterway.

Defendants' Site is a wetland which "has an affect on flows to Dyer Ditch, and ultimately the Little Calumet River." (Consent Decree Ex. 1, at 15.) The Little Calumet River is itself a navigable waterway.[9] A drop of rainwater landing in the Site is certain to intermingle with water from the Little Calumet River. The relationship between the wetlands and the navigable waterway is direct. The Site, therefore, has the "significant nexus" to a navigable waterway necessary to trigger Army Corps of Engineers' regulatory jurisdiction under CWA § 404(a).

THE CONSENT DECREE

A. *Stipulated Penalties for Violations of the Consent Decree.*

The United States seeks enforcement of Article VI of the Consent Decree ("Stipulated Penalties") for Defendants' failure to (1) timely pay the $23,500 fine and (2) complete the agreed upon tasks within the prescribed timeline. Defendants argue Article VI of the Consent Decree is a liquidated damages provision and an unenforceable penalty because the amounts are unconscionable and bear no relation

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9. "Navigable from the Indiana-Illinois State Line for 21.24 river miles to Burns Waterway Harbor; and navigable for an additional 17.75 river miles to its junction (as Kemper Ditch) with Interstate 94. (The river is also navigable in Illinois.)" Natural Resources Commission—Lake Michigan and Other Navigable Waters, at http://www.state.in.us/ nrc/policy/III.html.

to harm suffered.[10] (*See, e.g.*, Def. Mem. in Opp. to U.S. Motion to Enforce Consent Decree, at 5, 10.)

"Although consent decrees have the force of a court order, they are also a form of contract to be construed according to basic principles of contract interpretation." *Ahern v. Board of Educ.*, 133 F.3d 975, 981 (7th Cir. 1998). "The source of the obligations in the decree is the parties' will, not federal law." *Kasper v. Board of Election Comm'r.*, 814 F.2d 332, 338 (7th Cir.1987). "[T]he intention of the parties is the key to deciding whether a provision is to be considered a penalty or liquidated damages." *United Order of Am. Bricklayers and Stone Masons Union No. 21 v. Thorleif*, 519 F.2d 331, 332 (7 th Cir.1975). The parties titled Article VI "*Stipulated Penalties* for Future Violations of Consent Decree" (emphasis added) and use the phrase "stipulated penalties" five times in the text of Article VI. There is no evidence, in the text of the Consent Decree, Defendants' briefs or otherwise suggesting an intent to liquidate damages. Therefore, the court finds the parties

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10. An Agreement, made in advance of breach, fixing the damages therefor, is not enforceable as a contract and does not affect the damages recoverable for the breach, unless

> (a) the amount so fixed is a reasonable forecast of just compensation for the harm that is caused by the breach, and
>
> (b) the harm that is caused by the breach is one that is incapable or very difficult of accurate estimation.

RESTATEMENT (SECOND) OF CONTRACTS § 339.

intended Article VI of the Consent Decree to act as a stipulated penalty and not liquidated damages.

The next question is whether the stipulated penalty provision of Article VI is enforceable. In *U.S. v. Krilich*, 948 F.Supp. 719, 726 (N.D. Ill. 1996), *aff'd.*, 209 F.3d 968 (7th Cir. 2000), *cert. denied sub nom. Krilich v. U.S.*, 531 U.S. 992 (2000), the court found "it would not be unconscionable or otherwise inappropriate to have a provision that imposes a penalty" in a consent decree to settle CWA claims. The rationale for imposing the stipulated penalties was that the parties "were reaching a compromise regarding possible statutory penalties." *Id.* Under CWA, the maximum statutory penalty is $ 25,000 per day for each violation. *See* 33 U.S.C. § 1319(d). In light of this maximum penalty, the court concluded it was not unconscionable to enforce the stipulated penalty provision of $2,500 per day. *See id.* at 726-27 (imposing stipulated penalties of $1,307,500).

Prior to signing the Consent Decree, Defendants had two options available. They could either litigate or settle. Had they litigated, Defendants would have assumed the risk of court-imposed civil penalties of up to $ 25,000 per day for each violation of the CWA.[11] The amount of the penalties

11. In determining the amount of civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice might require.

33 U.S.C. § 1319(d).

would have been a function of factors not within Defendants' direct control. Understandably, Defendants decided they did not want to assume the risk of litigation. By settling, Defendants traded the litigation risk for the certainty of prescribed penalties and definite triggering events. As it turned out, the Defendants and the government agreed upon a schedule of stipulated penalties:

A. For day 1 up to and including day 30 of non-compliance	$1,500.00 per day
B. For day 31 up to and including day 60 of non-compliance	$2,000.00 per day
C. For day 61 and beyond of non-compliance	$2,500.00 per day

(Consent Decree, at ¶ 19.) Defendants made a rational decision about the risks associated with litigating the case. Defendants arrived at this agreement through arms-length negotiations and they were represented by competent counsel throughout the process. Before entry of the Consent Decree, the court found the terms to be reasonable and fair. (*See* Consent Decree, at pg. 2.) In addition, the stipulated amounts represent a small fraction of the maximum penalty a court might impose under CWA. The court therefore finds the stipulated penalty provision of the Consent Decree is enforceable.

Appendix C

(1) *Payment of $23,500 penalty.*

Defendants had agreed to pay the $23,500 civil penalty no later than thirty days after the court's January 26, 1999 entry of the Consent Decree. On May 4, 1999, Defendants remitted that amount to the government. (*See* Mem. in Support of U.S. Motion to Enforce the Consent Decree, at Ex. 4.) At no time prior to late payment of this penalty did Defendants exercise their rights under the force majeure provisions of the Consent Decree. *See* Consent Decree at ¶ 24 ("If an event occurs which causes or may cause Defendants to fail to comply fully and timely with any requirement of this Consent Decree, Defendants shall notify in writing EPA and the Department of Justice."). Since Defendants remitted payment 67 days late, Defendants are jointly and severally liable in the amount of $122,500.[12]

12. Calculated as follows: $45,000 for the first 30 days (at $1,500 per day), plus $60,000 for the next thirty days (at $ 2,000 per day), plus $17,500 for the final seven days (at $ 2,500 per day).

Appendix C

(2) *Completion of agreed upon tasks.*

Defendants also agreed to complete the following tasks:

Task	Deadline
a. Excavation	December 31, 1998
b. Seal seven stormsewer inlets	December 31, 1998
c. Raise one stormsewer inlet	December 31, 1998
d. Replace stormwater pipe with solid pipe or encase in impermeable material	December 31, 1998
e. Initial seeding and planting	April 30, 1999

(Consent Decree, at ¶ 16a.) The government asserts Defendants have not adhered to the timeline and they move to enforce the stipulated penalties.

Defendants argue, however, they should be liable for no penalties whatsoever. In particular they claim, "[t]he delay in completion of the excavation task until September 1999 was caused primarily by the fact that four of the deadlines in the Decree had passed at the time the Decree was entered." (Def. Mem. in Opp. to the U.S. Motion to enforce the Consent Decree, at 11.) Defendants had multiple opportunities to remedy this. Defendants' first chance was to bring its issue with the deadlines to the court's attention before the Consent Decree was entered. Since they expressly assumed the risk

of cumbersome governmental procedures,[13] Defendants had the burden of bringing this matter to the court's attention. Second, after the Consent Decree was entered, Defendants had the right to notify the EPA and Department of Justice as prescribed in the force majeure[14] provision of the Consent Decree. Defendants failed to invoke either of these readily-available methods to communicate their need for additional time.

In addition, the court is skeptical that the delay until September 1999 was caused primarily by the government's slow response time. Counsel for Defendants signed the agreement on August 3, 1998.[15] Counsel is therefore presumed to know that (1) the December 31, 1998 deadlines were five months away and (2) the agreement was subject to a public comment period of thirty days. This means that if the government took only thirty days to finalize its approvals and the court instantaneously entered the settlement, Defendants would have had four months from the date of

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13. "Defendants consent to the entry of this Consent Decree without further notice." (Consent Decree, at ¶ 34.)

14. 25. If the parties to this Consent Decree agree that the violation of a provision of this Consent Decree has been or will be caused by circumstances beyond the control of the Defendants . . . the time for performance of such provision shall be extended in writing by EPA for a period equal to the actual delay resulting from such circumstances.

15. *See supra* note 3.

entry until the December 31, 1998 deadline. Had Defendants completed excavation within four months of entry of the Consent Decree, the court could perhaps appreciate Defendants' position that the government's response time was a factor in the excavation delay. Yet, it took *eight months* from the date of entry for Defendants to substantially perform their excavation duty under the Consent Decree. Defendants present no reason why the court should let Defendants off the hook for stipulated penalties.

Nevertheless, Defendants' point is well taken; EPA must bear some of the burden associated with their unwieldy procedures. On the day the Consent Decree was entered, January 26, 1999, the deadline had already expired for the first four tasks. Under the technical terms of the Consent Decree, stipulated penalties had begun to accrue on December 31, 1998. Clearly, for the court to impose penalties for the period of time before the Consent Decree was entered would be inequitable. The court, therefore, in the exercise of discretion, extends a four month "credit" to Defendants, by calculating stipulated penalties from the date four months (120 days) after January 26, 1999.

a. Excavation.

Defendants agreed to complete excavation no later than December 31, 1998. They began excavation during the week of September 20, 1999. (*See* Mem. in Support of U.S. Motion to Enforce the Consent Decree, at Ex. 9 & 10.) On October 1, 1999, the excavation work was complete. The government notes that only 95% of the work was completed by that time. For that reason, the government also seeks penalties beyond October 1, 1999.

Appendix C

Defendants' completion of 95% of excavation work brought them into substantial compliance with the Consent Decree. The court believes it would be inequitable to bring the full wrath of the penalty provision to bear on Defendants for the period of time after which they were in substantial compliance. The court, therefore, in the exercise of discretion, will only consider the imposition of penalties up to October 1, 1999.

After applying the four month credit, Defendants were 127 days late in completing the excavation work as agreed in the Consent Decree. Therefore, the court finds the Defendants jointly and severally liable for $ 272,500[16] in stipulated penalties for the untimely completion of the excavation.

b. Seal seven stormsewer inlets; c. Raise stormsewer inlet; d. Replace stormwater pipe with solid pipe or encase in impermeable material.

Defendants agreed to seal seven stormsewer inlets, raise a stormsewer inlet and replace a stormwater pipe or encase it with impermeable material, no later than December 31, 1998. Defendants did not complete these tasks until October 1, 2000, 613 days after the Consent Decree was entered. Defendants seek to avoid stipulated penalties for the untimely completion. They assert "the completion of these tasks was delayed by circumstances involving changed facts, and concerns by the Town of Dyer." (Def. Mem. in Opp. to the

16. Calculated as follows: $ 45,000 for the first 30 days (at $1,500 per day), plus $ 60,000 for the next 30 days (at $ 2,000 per day), plus $ 167,500 for the final 67 days (at $ 2,500 per day).

U.S. Motion to enforce the Consent Decree, at 12.) The force majeure to which the parties agreed was designed to address precisely this situation. *See supra* note 14. Defendants proper remedy for the delays was to assert their rights under the force majeure, not to seek modification of the decree after the fact.[17]

After applying the four month (120 day) credit, Defendants are liable for 493 days of penalties. The court finds Defendants jointly and severally liable in the amount of $1,187,500[18] for each of the three untimely tasks for a total stipulated penalty of $3,562,500.

e. Initial seeding & planting.

Defendants also agreed to complete initial seeding and planting no later than April 30, 1999. Defendants admit the seeding and planting was finalized on October 5, 1999. (*See* Mem. in Support of U.S. Motion to Enforce the Consent Decree, at Ex. 17.) This constitutes a delay of 158 days.

The government also seeks stipulated penalties for Defendants' failure to make timely notification of the seeding and planting. The general purpose of the Consent Decree was to clean up the Site and return it to environmental compliance.

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17. In addition, if the court absolves Defendant from the stipulated penalties on the grounds Defendants suggest, the court would be reading the force majeure out of the Consent Decree.

18. Calculated as follows: $45,000 for the first 30 days (at $1,500 per day), plus $60,000 for the next 30 days (at $2,000 per day), plus $1,082,500 for the final 433 days (at $2,500 per day).

The parties agreed to accomplish this through the completion of certain tasks. Defendants have complied with the specific substantive task of seeding and planting but failed to strictly adhere to the notification requirements. Notification requirements serve important objectives and compliance with them is required. Yet, the court will not exercise its equitable powers in favor of imposing additional penalties for merely failing to notify where the substantive portion of the task has been completed. Therefore, the court finds Defendants jointly and severally liable in the amount of $61,000.[19]

B. *Defendants' Motion for Dispute Resolution.*

Next, the court considers Defendants' Petition for dispute resolution. Defendants seek dispute resolution with respect to the portion of the Consent Decree requiring them to "[c]onduct wetland boundary delineation of areas required to be restored under this consent decree" no later than June 1999. (Consent Decree, at ¶ 16.) Defendants propose a revised deadline for wetland delineation of September 30, 2000. (*See* Def. Pet. for Dispute Resolution under Consent Decree, at ¶ 25.) In the interest of producing an accurate boundary delineation, the court adopts Defendants' proposal for the revised deadline of September 30, 2000. Defendants remain obliged to secure all notifications, approvals and consents as prescribed in the Consent Decree.

Defendants also seek dispute resolution with respect to the portion of the Consent Decree requiring them to "[s]ubmit

19. Calculated as follows: $45,000 for the first 30 days (at $1,500 per day), plus $16,000 for the next 8 days (at $2,000 per day).

annual monitoring report[s]" for the five year period ending September 2003. (Consent Decree, at ¶ 16.) Defendants propose that they produce six annual reports, from September 2000 through September 2005, inclusive. (*See* Def. Pet. for Dispute Resolution under Consent Decree, at ¶ 25.) Since an important objective of the Consent Decree is to ensure prospective environmental health of the Site, the court grants Defendants' petition for dispute resolution with regard to the annual monitoring reports.

As for the other issues raised in defendants' Petition for Dispute Resolution, the court has previously addressed them in the discussion of stipulated penalties.

C. *Completion of Excavation.*

The government also seeks excavation of the remaining 5% of the Site. This is described as a "115 foot by 40 foot area within the wetland restoration area." (Mem. in Support of U.S. Motion to Enforce Consent Decree, at Ex. 2, ¶ 24.) According to EPA officer Gregory T. Carlson, Defendants had not excavated this area as of September 25, 2000. (*Id.*) Defendants claim they have completed all excavation and there is no duty under the Consent Decree to perform further excavation. They assert the EPA's conclusions about the duty to excavate the 115' x 40' area "were based upon erroneous interpretations of data and of the Restoration Plan." (Def. Mem. in Opp. to the U.S. Motion to Enforce the Consent Decree, 11.)

The affidavit of Defendants' environmental consultant, Eric Ellington, ("Ellington Affidavit") however, suggests the

need for additional excavation. In particular, paragraphs 16 and 17 of the Ellington Affidavit refer to requests for "95% completion inspection" and paragraph 20 notes Mr. Carlson of EPA's review and approval of the "95% earthwork completion." This is a clear acknowledgment by Defendants' consultant that Defendants needed to excavate another 5%. Defendants are hereby ordered to do so no later than ninety (90) days from the filing of this Order. If Defendants have already excavated the remaining 5%, they merely need to satisfy the notification and approval requirements of the Consent Decree. If the Defendants have a bona fide dispute over "interpretations of data and of the Restoration Plan," the court refers Defendants to the Dispute Resolution provisions[20] of the Consent Decree.

For the foregoing reasons, **IT IS THEREFORE ORDERED THAT** Defendants are jointly and severally liable for $4,018,500 of stipulated penalties for violations of the Consent Decree.

IT IS FURTHER ORDERED THAT Defendants complete excavation as required in the Consent Decree no later than ninety (90) days from the date of the issuance of this Order.

THE COURT FINDS THAT Defendants substantially complied with their boundary delineation duty by September 30, 2000, **GRANTS** dispute resolution in favor of Defendants by declining to assess stipulated penalties for completion of the aforementioned delineation and **ORDERS** Defendants

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20. *See* Consent Decree, at IX.

to comply with all notification and consent requirements relating thereto, as set forth in the Consent Decree.

IT IS FURTHER ORDERED THAT Defendants submit annual monitoring reports in accordance with the specifications set forth in the Consent Decree, from September 2000 through September 2005, inclusive.

IT IS FURTHER ORDERED THAT Defendants' "Request for Evidentiary Hearing on Pending Motions" is DENIED.

IT IS FURTHER ORDERED THAT Defendants' "Petition for Modification of Consent Decree" is **DENIED**.

IT IS FURTHER ORDERED THAT the "United States' Motion to Strike" is **DENIED AS MOOT**.

THE CLERK IS DIRECTED TO ENTER JUDGMENT in favor of the United States of America, against Rueth Development Company and Harold G. Rueth, jointly and severally, in the amount of $4,018,500, for stipulated penalties for violations of the consent decree between these three parties entered by this court on January 26, 1999.

SO ORDERED.

s/ Moody
JUDGE, UNITED STATES DISTRICT JUDGE

Enter: September 25, 2001

APPENDIX D — CONSENT DECREE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA DATED AND FILED JANUARY 26, 1999

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA

Civil Action No. 2:96CV-540-JM

UNITED STATES OF AMERICA,

Plaintiff,

v.

RUETH DEVELOPMENT COMPANY, and HAROLD G. RUETH,

Defendants.

CONSENT DECREE

WHEREAS, the United States of America, on behalf of the United States Environmental Protection Agency ("EPA"), filed a complaint herein on November 1, 1996, ("Complaint") alleging that defendants Rueth Development Company and Harold G. Rueth (collectively the "Defendants") have violated the Clean Water Act ("CWA"), 33 U.S.C. §§ 1311 and 1344; and

WHEREAS, the violations alleged involved unlawful dredging and filling of federally regulated wetlands on certain property located in southeastern Dyer, Indiana, referred to

in the Complaint as Castlewood Unit No. 3A and Castlewood Unit No. 3B (the "Site"), described in local land records as the South Half of Section 18, Township 35 North, Range 9 West of the Second Principal Meridian; and

WHEREAS, the Defendants are alleged to have owned or controlled the Site, to have carried out the unlawful dredging and filling at the Site, or to have controlled and directed the unlawful dredging and filling at the Site; and

WHEREAS, the Defendants deny unlawfully dredging and filling federally regulated wetlands at the Site or otherwise violating sections 301(a) and 404 of the CWA, 33 U.S.C. § 1311(a) and 1344, at the Site; and

WHEREAS, the parties to this Consent Decree wish to settle and compromise this case; and

WHEREAS, the parties to this Consent Decree agree that settlement of this case is in the public interest and that entry of this Consent Decree without further pretrial proceedings or a trial of any issue of fact or law in this case is the most appropriate means of resolving this matter; and

WHEREAS, the Court finds that this Consent Decree is a reasonable and fair settlement of this action and that it adequately protects the public interest in accordance with the CWA;

NOW, THEREFORE, before the taking of any testimony and without trial or adjudication of any issue of fact or law, and upon consent of the parties by their attorneys and authorized officials,

Appendix D

IT IS HEREBY AGREED, ORDERED, ADJUDGED AND DECREED as follows:

DEFINITIONS

A. "Castlewood Development Wetland Restoration Plan" means the specifications and criteria for wetland restoration and mitigation embodied in the following five documents, all of which are attached hereto as Exhibit 1 and incorporated herein by reference: (1) "Wetland Restoration Castlewood Development, Dyer, Indiana - Unit 3B," (2) "Wetland Restoration - Demolition, Castlewood Development, Dyer, Indiana - Unit 3B," (3) "Wetland Restoration - Grading/Re-vegetation, Castlewood Development, Dyer, Indiana - Unit 3B," (4) "Wetland Restoration - Details, Castlewood Development, Dyer, Indiana - Unit 3B," and (5) "Wetland Restoration - Specifications, Castlewood Development, Dyer, Indiana - Unit 3B." In case of ambiguity or conflict between the Castlewood Development Wetland Restoration Plan and this Consent Decree, the provisions of this Consent Decree shall control.

B. "Vegetative Performance Standards" mean the following: (1) by the end of the second full growing season, 75% vegetative coverage in each plant community zone; (2) by the 5th anniversary of the planting/seeding date, 80% coverage in each plant community zone; (3) no greater than 20% of species coverage within any plant community zone may be non-native species; and (4) each plant community zone is dominated by facultative plus ("FAC+"), facultative wetland ("FACW"), or obligate ("OBL") plant species in

accordance with the National List of Plant Species That Occur in Wetlands: North Central (Region 3).

C. "Non-native species" mean those species identified as such in the Fourth Edition of *Plants of the Chicago Region*, by Floyd Swink and Gerould Wilhelm, Indiana Academy of Sciences Press, 1994.

D. "Dominance" means more than 500 of the dominant plant species (as measured by percent area coverage) from all strata are Obligate (OBL), Facultative Wet (FACW) or Facultative (FAC) (excluding Facultative Minus (FAC-)) on the National List of Plant Species That Occur in Wetlands: North Central (Region 3).

I. *JURISDICTION AND VENUE*

1. This Court has jurisdiction over the subject matter of this action and jurisdiction over the parties pursuant to 28 U.S.C. §§ 1331, 1345 and 1355, and CWA section 309(b), 33 U.S.C. § 1319(b).

2. The Complaint states a claim upon which relief can be granted pursuant to CWA sections 301, 309 and 404, 33 U.S.C. §§ 1311, 1319, and 1344.

3. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b), and CWA section 309(b), 33 U.S.C. § 1319(b).

Appendix D

II. *APPLICABILITY*

4. The provisions of this Consent Decree shall apply to and be binding upon the parties to this action, their officers, directors, servants, employees, successors or assigns and any person, firm, association or corporation who is, or will be, acting in concert or participation with the Defendants, whether or not such person has notice of this Consent Decree. Each of the Defendants shall provide a true copy of this Consent Decree, including all exhibits thereto, to any successor to his or her interest, and shall simultaneously notify the EPA and the United States Department of Justice, at the addresses specified in Section X (Addresses for Submissions), below, that such copy to any successor in interest has been given. In any action to enforce this Consent Decree, none of the Defendants shall raise as a defense the failure of any agents, employees, successors or assigns, or of any person, firm or corporation to take any actions necessary to comply with the provisions hereof.

5. This Consent Decree shall constitute a complete and final settlement of all civil claims against the Defendants in connection with Defendants' alleged violations of the CWA as set forth in the Complaint; and pertaining to civil penalties for Defendants' alleged CWA violations as set forth in the Complaint. The United States, however, does not waive its rights concerning criminal violations pursuant to section 309(c) of the CWA, 33 U.S.C. § 1319(c), or violations concerning imminent and substantial endangerment pursuant to section 504 of the CWA, 33 U.S.C. § 1364.

6. The transfer of ownership or other interest by any of the Defendants in the Site shall not alter or relieve the Defendants of their obligation to comply with all the terms of this Consent Decree. Should any of the Defendants make a transfer of ownership or any interest in the Site prior to the termination of the terms of this Consent Decree, Defendants shall notify EPA of such transfer and shall reserve such rights as are necessary to comply successfully with the terms of this Consent Decree.

7. By entering this Consent Decree, Defendants do not admit that they have committed the violations of the CWA as set forth in the Complaint.

8. Except as provided in Paragraph 41 of this Consent Decree, this Consent Decree shall not constitute and shall not be interpreted to be a permit to discharge pollutants pursuant to CWA sections 402 or 404, 33 U.S.C. §§ 1342 or 1344. The United States does not, by its consent to the entry of this Consent Decree, warrant or aver in any manner that Defendants' compliance with this Consent Decree will result in compliance with section 301 of the CWA. Notwithstanding EPA's review and approval of any plans, Defendants shall remain responsible for compliance with the terms of this Consent Decree and the CWA.

9. This Consent Decree in no way affects or relieves the Defendants of their obligations to comply with any federal, state, or local law, regulation, or permit.

Appendix D

10. This Consent Decree is not a settlement of, and in no way affects the United States' rights to seek penalties, injunctive relief, or remedial actions with respect to any violation by the Defendants of federal, state or local laws, regulations, or permit conditions not alleged in the Complaint.

11. This Consent Decree in no way affects the rights of the United States as against any person not a party hereto.

III. *PARTIES*

12. The Plaintiff is the United States of America. The United States Department of Justice is authorized to bring this suit pursuant to 28 U.S.C. §§ 516 and 519, and CWA section 506, 33 U.S.C. § 1366.

13. Rueth Development Company is an Indiana limited partnership, with a business address of 1006 165th Street, Hammond, Indiana.

14. Harold G. Rueth is and was at the time of the violations alleged in this Complaint, a general partner in Rueth Development Company.

IV. *INJUNCTIVE RELIEF*

NOW, THEREFORE, with the consent of the parties, it is hereby ORDERED:

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CESSATION OF UNAUTHORIZED DISCHARGES

15. Defendants are permanently enjoined from taking any actions, or causing others to take any actions, at the Site which result in the discharge of dredged or fill material into waters of the United States, as defined by the CWA and regulations promulgated thereunder, except as in compliance with an individual permit issued pursuant to CWA section 404(a), 33 U.S.C. § 1344(a), with any applicable general permit issued by the United States Army Corps of Engineers, or as may be necessary to effect remediation pursuant to Paragraph 16 of this Consent Decree.

RESTORATION

16. Defendants shall conduct and complete the "Castlewood Development Wetland Restoration Plan" which is attached to this Consent Decree as Exhibit 1. The parties acknowledge and agree that the objective of the "Castlewood Development Wetland Restoration Plan" is to replace the lost functions and values of the filled wetlands described in the Complaint by creating and restoring freshwater wetlands in the Restoration Area. To satisfy the obligation of this Paragraph 16, Defendants are ordered to do the following:

a. The Defendants shall conduct any and all Wetland Restoration at Castlewood Estates in accordance with the following schedule:

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DEADLINE	*TASK*
December 31, 1998	Complete excavation of soils to the wetland subgrade according to the Limits of Work in the "Castlewood Development Wetland Restoration Plan," attached hereto as Exhibit 1.
December 31, 1998	Cement in or seal the grated stormsewer inlets with water tight solid covers at the following locations: 1. northeast corner of Lot #25; 2. back end of Lot #29; 3. back end of Lot #30; 4. back end of Lot #31; 5. southwest corner of Lot #26; 6. northwest corner of Lot #26; and 7. northern curb/gutter of Canterbury Court (just south of the southwest corner of Lot #26).
December 31, 1998	Raise the stormsewer inlet at the northeast corner of Lot #32 to a mean sea elevation of 643.4 feet. The elevation must be verified by a certified professional land surveyor.

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December 31, 1998	A portion of the stormwater pipe behind Lots #28 - #32 will be excavated or televised and, if found to be constructed of perforated pipe, will either be removed and replaced with solid pipe or encased in impermeable material. Defendants shall notify EPA no less than one week prior to commencing this procedure.
April 30, 1999	Complete initial seeding and planting according to the seeding mixes provided for in the "Castlewood Development Wetland Restoration Plan," attached hereto as Exhibit 1.
June 1999	Conduct wetland boundary delineation of areas required to be restored under this consent decree through application of EPA's approved delineation manual. This delineation report shall be included in the August - September 1999 annual monitoring report.

b. The Defendants shall submit monitoring reports pursuant to the following schedule:

August - September 1999	Submit annual monitoring report within 2 weeks of the field monitoring day or the next business day.

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August - September 2000

Submit annual Monitoring report within 2 weeks of the field monitoring day or the next business day.

August - September 2001

Submit annual monitoring report within 2 weeks of the field monitoring day or the next business day.

August - September 2002

Submit annual monitoring report within 2 weeks of the field monitoring day or the next business day.

August - September 2003

Submit annual monitoring report within 2 weeks of the field monitoring day or the next business day.

Defendants' monitoring reports shall describe and quantify: (1) maintenance of erosion control measures; (2) site inundation and soil saturation; (3) local precipitation records for the five month period preceding the annual monitoring event and daily records for the thirty (30) day period preceding the annual monitoring event; and (4) attainment of vegetative performance standards. Monitoring work shall be conducted in August of each monitoring year during 1999 - 2003.

c. The "Castlewood Development Wetland Restoration Plan" shall be an enforceable obligation of this Consent Decree.

d. Defendants shall provide notices and plans if necessary under paragraph g to EPA's project manager, as identified in Section X (Addresses for Submissions) of this Decree, and an opportunity for inspection by EPA upon the completion of the following milestone events:

(i) Within thirty (30) days after the removal of dredged and fill material, excavation, final grading, and the raising or sealing of stormsewer inlets, but before seeding and planting has begun (in this notice Defendants shall provide EPA's project manager with spot elevations of grades, including the height of the stormwater inlet at the northeast corner of lot 32 in addition to the other information Defendants are required to provide under the provisions of this Consent Decree);

(ii) Within, two weeks after the completion of seeding and planting required by the "Castlewood Development Wetland Restoration Plan;" and

(iii) Within 30 days prior to the 1999-2003 August field monitoring dates noted in "Castlewood Development Wetland Restoration Plan" referred to in Paragraph 16b.

The notices shall include: a description of the actions taken to implement the "Castlewood Development Wetland Restoration Plan" since the previous notice or approval of the "Castlewood Development Wetland Restoration Plan;"

information regarding problems or unresolved delays encountered or anticipated that may affect the schedule for implementation; efforts made to mitigate any actual or anticipated delays; and all other information required by Section VII (Notices) of this Consent Decree.

e. Following EPA's receipt of a notice of completion of a milestone event as required in Paragraph 16(d), EPA shall have thirty (30) days to conduct an inspection. Defendants agree that they will not continue with any subsequent steps required by the "Castlewood Development Wetland Restoration Plan" until EPA has performed its inspection and has approved the work; provided, however, that if EPA has not conducted an inspection within thirty (30) days of its receipt of the notice, then Defendants may proceed to the next step of the "Castlewood Development Wetland Restoration Plan."

f. Following EPA's inspection after the completion of seeding and planting, if EPA agrees that the task has been completed as approved, EPA will issue a Certification of Completion. Following Certification, Defendants shall perform all operation and maintenance activities required under the "Castlewood Development Wetland Restoration Plan" as approved. If EPA disagrees that the task has been completed as approved, EPA will issue a letter specifying in detail all deficiencies.

g. Should any of the wetlands restored, created or enhanced pursuant to Paragraph 16 of this Consent Decree fail to achieve the performance standards specified in the "Castlewood Development Wetland Restoration Plan" by the

date of the fifth anniversary of planting, Defendants and the United States shall meet to develop the subsequent steps necessary to achieve the objectives of the "Castlewood Development Wetland Restoration Plan" and a schedule for completing the subsequent steps ("Subsequent Steps"). If Defendants and the United States are able to establish mutually agreeable Subsequent Steps, then within ninety (90) days of such notice from EPA, Defendants shall incorporate the Subsequent Steps into an amended "Castlewood Development Wetland Restoration Plan." Defendants shall implement the amended "Castlewood Development Wetland Restoration Plan," as approved by EPA, in accordance with the schedule in that amended "Castlewood Development Wetland Restoration Plan," and the amended plan shall be an enforceable obligation of this Consent Decree. If Defendants and the United States are unable to establish mutually agreeable Subsequent Steps within the time frame set forth above, then either party may petition the Court for resolution in accordance with the dispute resolution provision in Section IX (Dispute Resolution) of this Consent Decree.

h. If the Defendants do not complete the "Castlewood Development Wetland Restoration Plan" required under this Paragraph 16 and the requirements of Paragraph 16(a) and 16(b) above, they will be subject to stipulated penalties as provided in Section VI (Stipulated Penalties) of this Consent Decree.

i. The Defendants shall be responsible for making timely applications for and obtaining all necessary permits from all governmental bodies for the mitigation, restoration and enhancement work required by the "Castlewood Development Wetland Restoration Plan."

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V. *CIVIL PENALTIES*

17. The Defendants shall pay a civil penalty of $23,500, payable within thirty (30) days of the entry of this Consent Decree. Payment shall be made in accordance with the provisions of Paragraph 20 below, and mailed to the Department of Justice, at the address set forth in Section X (Addresses for Submissions) below. Civil Penalties shall be paid in addition to any payments which may be required under Section VI (Stipulated Penalties) below.

18. In the event that payment of the civil penalty assessed in this Consent Decree is not made, this Consent Decree shall be considered an enforceable judgment for purposes of post-judgment collection, in accordance with Fed. R. Civ. P. 69, and other applicable federal statutory authority.

VI. *STIPULATED PENALTIES FOR FUTURE VIOLATIONS OF CONSENT DECREE*

19. Unless excused by the provisions of Section VIII (Force Majeure) below, Defendants shall incur the following stipulated penalties for failure to comply with any milestone set forth in the "Castlewood Development Wetland Restoration Plan," attached hereto as Exhibit 1, and any milestone set forth in Paragraph 16 and Paragraph 17 of this Consent Decree, or any other requirement of this Consent Decree to which the United States reserves its rights under the CWA. The stipulated penalties shall be paid within five days of the day of non-compliance.

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A.	For day 1 up to and including day 30 of non-compliance	$1500.00 per day
B.	For day 31 up to and including day 60 of non-compliance	$2000.00 per day
C.	For day 61 and beyond of non-compliance	$2500.00 per day

20. The civil penalty provided for in Section V (Civil Penalties) above, and any stipulated penalties incurred under this Consent Decree shall be paid by certified or cashier's check, payable to the "Treasurer of the United States of America," and delivered to the United States Department of Justice at the address specified in Section X (Addresses for Submissions) below. Upon making such payment, Defendants shall simultaneously send EPA, at the address specified in Section X (Addresses for Submissions) below, a copy of the check and the letter transmitting it.

21. In the event that Defendants fail to make timely payment of any of the monies due pursuant to this Consent Decree, interest will be charged in accordance with the rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717, from the time payment is due until the time it is made.

22. Nothing in this Consent Decree shall be construed to limit any other remedies available to the United States for violations of this Consent Decree, such as the institution of contempt proceedings, or any provisions of law, including CWA section 504, 33 U.S.C. § 1364. The stipulated penalties

set forth in Paragraph 19 above shall not limit the United States' right to apply to the Court for the maximum civil penalties allowed by the CWA per day of violation of the CWA. Any disputes about the Defendants' liability for stipulated penalties that cannot be resolved by the parties hereto shall be resolved by motion to this Court, in accordance with the Dispute Resolution provisions of Section IX (Dispute Resolution) below.

VII. *NOTICES*

23. All notices required to be filed pursuant to the "Castlewood Development Wetland Restoration Plan," attached hereto as Exhibit 1, and as required under Paragraph 16 of this Consent Decree shall be provided to EPA and the United States Department of Justice at the addresses specified in Section X (Addresses for Submissions) of this Consent Decree, and shall state whether or not all of that work required by that particular milestone has been completed.

a. If the required task has been completed, the notice shall specify the date on which it was completed, attach any photographs, videotapes, or other appropriate evidence of such completion and include a certification by the Defendants that such completion has been achieved. Such certifications shall be made in the following form:

> I/we certify that the information contained in and/or accompanying this (submission) (document) is true, accurate and complete. As to (the) (those) portion(s) of this (submission) (document) for which I/we

> cannot personally verify (its) (their) truth and accuracy, I/we certify, as the company official(s) having supervisory responsibility for person(s) who, acting under my/our direct instructions; made the verification, that this information is true, accurate and complete.

If the notice is prepared by a contractor or consultant retained by one or more of the Defendants, the certification shall consist of two parts: first, a statement in the above form signed by an officer of the contractor or consultant; and second, a statement signed by one of the Defendants, which shall state as follows:

> As the (individual) (company official) having responsibility for the oversight of the (contractor) (consultant) who prepared this document, I certify that I have made a reasonably diligent effort to verify the truth and accuracy of the document and that it is, to the best of my knowledge, true, accurate, and complete.

b. If the required task has not been completed, Defendants shall submit a written notice in accordance with the requirements of Section VIII (Force Majeure) below. Failure to submit such written notice shall constitute a waiver of Defendants' right to obtain an extension of time under the provisions of Section VIII (Force Majeure) below. Submission of any notice shall not relieve Defendants of their obligation to comply with any requirement of this Consent Decree.

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VIII. *FORCE MAJEURE*

24. If an event occurs which causes or may cause Defendants to fail to comply fully and timely with any requirement of this Consent Decree, Defendants shall notify in writing EPA and the Department of Justice, at the addresses stated in Section X (Addresses for Submissions) below, within fourteen days (14) of the date when Defendants first learned of the violation, or within fourteen days (14) of the date when Defendants should have known of the event by the exercise of due diligence. The notice shall describe in detail: the event or events which have caused the violation, the anticipated length of time the violation may persist, the measures taken or intended to be taken by Defendants to prevent or minimize the violation, and the timetable by which those measures will be implemented. Failure to comply with the notice requirements of this section shall constitute a waiver of Defendants' right to obtain an extension of time under Paragraph 25 below as to the particular violation involved. Defendants shall also give written notice within fourteen (14) days of the occurrence of any event which gives Defendants reason to believe that such event will cause a violation of any provision of this Consent Decree.

25. If the parties to this Consent Decree agree that the violation of a provision of this Consent Decree has been or will be caused by circumstances beyond the control of the Defendants or of any entity controlled by Defendants, including consultants and contractors, and that Defendants and such entities could not have reasonably foreseen and prevented such violation, the time for performance of such provision shall be extended in writing by EPA for a period

equal to the actual delay resulting from such circumstances, and stipulated penalties shall not be due for the delay.

26. If the parties to this Consent Decree are unable to agree whether the violation was caused by circumstances beyond the control of Defendants or any entity controlled by Defendants, or whether the length of time for fulfilling the provision should be extended, the matter may be submitted by any party to the Court for resolution, in accordance with the requirements of Section IX (Dispute Resolution) below. The Defendants shall bear the burden to prove that any delay was caused by unforeseen circumstances beyond the Defendants' control. If the violation is then determined to have been caused by circumstances beyond the control of Defendants and of any entity controlled by Defendants, including consultants or contractors, and that Defendants could not have reasonably foreseen and prevented such violation, Defendants shall be excused as to that violation for the period of time the violation continues due to such circumstances.

27. Neither reasonably foreseeable technical problems, changes in Defendants' financial circumstances, nor unanticipated or increased costs or expenses associated with the implementation of actions required by this Consent Decree shall serve as the basis for changes in this Consent Decree or extensions of time for the performance of its requirements.

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IX. *DISPUTE RESOLUTION*

28. Any dispute arising under or with respect to this Consent Decree shall in the first instance be the subject of informal negotiations among the parties to this Consent Decree for a period of fifteen (15) working days from the time notice of the existence of the dispute is given. The period for negotiations may be extended by written agreement of the parties to this Consent Decree.

29. If a dispute cannot be resolved by informal negotiation under Paragraph 28 above, then the position advanced by the United States shall be considered binding unless, within fifteen (15) days after the end of the informal negotiations period, Defendants file a petition with this Court setting forth the matter in dispute, the efforts made by the parties to resolve it, and Defendants' proposed resolution. The United States shall have twenty (20) days to file a response to Defendants' petition with an alternative proposal for resolution of the dispute. In proceedings on any dispute under this Paragraph, Defendants shall have the burden of showing that their proposal meets the requirements of this Consent Decree and the CWA.

30. The filing of a petition asking the Court to resolve a dispute shall not of itself extend or postpone any obligation of Defendants under this Consent Decree, but the payment of stipulated penalties with respect to the disputed matter shall be stayed pending resolution of the dispute. To the extent Defendants show that a delay or other noncompliance was due to a force majeure event or otherwise prevails on the disputed issue, stipulated penalties shall be excused.

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X. *ADDRESSES FOR SUBMISSIONS*

31. Any payment of monies due under the terms of this Consent Decree, notices, or other submissions required to be submitted to EPA or the United States Department of Justice shall be delivered to the following addresses:

A. *To The United States Department of Justice*:

Steven E. Rusak, Trial Attorney
U.S. Department of Justice
Environment and Natural Resources Division
10th & Constitution Avenue, N.W.
Washington, D.C. 20530

B. *TO EPA*:

Gregory T. Carlson, Project Manager
Watershed & Nonpoint Source
Programs Branch
EPA - Region 5 (WW-16J)
77 West Jackson Blvd.
Chicago, IL 60604

Richard Murawski, Esq.
EPA - Region 5
Office of Regional Counsel, CA-29A
77 West Jackson Blvd.
Chicago, IL 60604

32. Any notice or other communications given by the United States to the Defendants shall be submitted to the following address:

Michael L. Muenich, Esq.
3235 45th Street
Highland, Indiana 46322

XI. *COSTS OF SUIT*

33. Each party shall bear its own costs and attorneys' fees relating to the matters covered by this Consent Decree. Should the Defendants subsequently be determined to have violated the terms and conditions of this Consent Decree, Defendants shall be liable to the United States for any costs and attorneys' fees incurred by the United States in any action against the Defendants for such noncompliance.

XII. *PUBLIC COMMENT*

34. Defendants consent to the entry of this Consent Decree without further notice. The parties agree that after the lodging of this Consent Decree, and prior to its entry, the United States shall, pursuant to 28 C.F.R. § 50.7, publish a public notice of this Consent Decree and provide an opportunity for public comments. The United States reserves the right to withhold or withdraw its consent to entry of this Consent Decree based upon such public comments.

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XIII. *CONTINUING JURISDICTION OF THE COURT*

35. This Court shall retain jurisdiction of this action until termination of this Consent Decree in order to enforce this Consent Decree in any manner consistent with applicable law, or to resolve all disputes arising hereunder as may be necessary or appropriate for the construction, modification or execution of this Consent Decree.

36. During the pendency of this action, any party may apply to the Court for any relief necessary to construe or effectuate this Consent Decree. The United States reserves all legal and equitable remedies available to enforce the provisions of this Consent Decree. Rueth Development Company and Harold G. Rueth reserve all legal and equitable remedies available to enforce the provisions of this Consent Decree.

37. Upon its entry by this Court, this Consent Decree shall have the force and effect of a final judgment. Any modification of this Consent Decree shall be in writing and, except for extensions of time pursuant to this Consent Decree provided in Section VIII (Force Majeure) above, shall not take effect unless signed by the parties and approved by the Court.

38. This Consent Decree shall terminate after the Defendants fully and completely fulfill all obligations under the Consent Decree, including completing the requirements of the Workplan, and paying any amounts, penalties or costs that may be due under this Consent Decree. When appropriate, Defendants shall notify the United States, at the addresses set forth in Section X (Addresses for Submissions), that Defendants have fulfilled all obligations of this Consent Decree. If EPA agrees that all obligations have been fulfilled,

Defendants and EPA will file a joint request with the Court to terminate the Consent Decree. Any dispute between the parties as to the completion of all obligations under the Consent Decree shall be resolved pursuant to Section IX (Dispute Resolution) of the Consent Decree.

XIV. *COMPUTATION OF TIME*

39. In computing any period of time prescribed or allowed by this Consent Decree, the day of the act after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday or legal holiday.

XV. *JOINT OBLIGATIONS*

40. All obligations undertaken collectively in this Consent Decree by the Defendants are joint and several in nature. Should one or more of the Defendants fail to perform, the remaining Defendants shall be responsible for performance of the obligation, including the payment of any stipulated penalties that have accrued.

XVI. *MISCELLANEOUS*

41. The United States acknowledges that Nationwide Permit 32, found at 33 C.F.R. Part 330 (56 Fed. Reg. 59,110, 59,144 (Nov. 22, 1991)), authorizes discharges of dredged or fill material placed or remaining in the area depicted on Exhibit 1, and for work undertaken in accordance with and in compliance with the terms of this Consent Decree, all subject to the conditions provided in the Nationwide Permit.

Appendix D

XVII. *SIGNATORIES*

42. Each undersigned representative of a party to this Consent Decree certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind such party to this document.

FOR THE DEFENDANTS:

s/ Michael L. Muenich
MICHAEL L. MUENICH, Esq.
3235 45th Street
Highland, Indiana 46322

s/ 08/03/98
Dated

FOR THE UNITED STATES OF AMERICA:

LOIS J. SCHIFFER
Assistant Attorney General
Environment & Natural Resources Division
United States Department of Justice

s/ Steven E. Rusak
STEVEN E. RUSAK
Trial Attorney
Environmental Defense Section
Environment & Natural Resources Div.
601 D Street, N.W.
Washington, D.C. 20004
(202) 514-9275

Oct. 21, 1998.
Dated

Appendix D

FOR THE UNITED STATES OF AMERICA:

s/ Steven A. Herman — 9/30/98
STEVEN A. HERMAN — Dated
Assistant Administrator for
Enforcement and Compliance Assurance
U.S. EPA
Washington, D.C. 20460

FOR THE UNITED STATES OF AMERICA:

s/ David A. Ullrich — September 10, 1998
DAVID A. ULLRICH — Dated
Acting Regional Administrator
U.S. EPA - Region 5
77 West Jackson Blvd.
Chicago, IL 60604

JUDGMENT IS HEREBY ENTERED in accordance with the terms of the foregoing Consent Decree this 26 day of January, 1999.

s/ [illegible]
UNITED STATES DISTRICT JUDGE
United States District Court
for the Northern District of Indiana

APPENDIX E — STATUTORY PROVISIONS INVOLVED

33 U.S.C. § 1311 provides in pertinent part:

§ 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law.

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1344 provides in pertinent part:

§ 1344. Permits for dredged or fill material

(a) Discharge into navigable waters at specified disposal sites.

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

Appendix E

33 U.S.C. § 1362 provides in pertinent part:

§ 1362. Definitions

* * *

(5) The term "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. * * *

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

* * *

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

* * *

Appendix E

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

* * * *

(2)

SUPREME COURT, U.S.
FILED
NOV 12 2003
OFFICE OF THE CLERK

No. 03-548

IN THE

Supreme Court of the United States

RUETH DEVELOPMENT COMPANY and
HAROLD G. RUETH,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS' SUPPLEMENTAL BRIEF

STEPHEN A. STUDER
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4 pp

PETITIONERS' SUPPLEMENTAL BRIEF

Petitioners respectfully submit this Supplemental Brief pursuant to Supreme Court Rule 15.8 to call attention to two additional petitions for writs of certiorari which were filed after Petitioners filed their petition which present essentially the same substantive question.

On October 28, 2003, Newdunn Associates, LLP, et al. filed their petition for a writ of certiorari seeking review of the Fourth Circuit's decision in *Treacy v. Newdunn Associates, LLP*, 344 F.3d 407 (4th Cir. 2003). *See Newdunn Associates, LLP v. United States*, No. 03-637. On November 10, 2003, James and Rebecca Deaton filed their petition for a writ of certiorari seeking review of the Fourth Circuit's decision in *United States v. Deaton*, 323 F.3d 698 (4th Cir. 2003). *See Deaton v. United States*, No. 03-____.[1]

Petitioners here have asked

> [w]hether the Seventh Circuit erred in concluding that Section 404(a) of the Clean Water Act, 33 U.S.C. § 1344(a), permits the government to regulate wetlands that 'are *not* adjacent to open water' in contravention of this Court's decision in *Solid Waste Agency of N. Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 168 (2001) [*SWANCC*].

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1. It is also counsel's understanding that a petition for a writ of certiorari is forthcoming on behalf of John A. Rapanos appealing the Sixth Circuit's decision in *United States v. Rapanos*, 339 F.3d 447 (6th Cir. 2003). That case, as discussed in Petitioners' petition, addresses the same issues presented by Petitioners and the *Deaton* and *Newdunn Associates* petitions.

Petitioners in *NewDunn Associates* and *Deaton* present substantively identical questions in their petitions. In *NewDunn Associates*, Petitioners ask "[w]hether federal Clean Water Act jurisdiction over 'navigable waters' extends to wetlands that are not adjacent or contiguous to open waters but from which rainwater runoff may occasionally reach navigable waters located miles away through a series of manmade, indirect, ephemeral, and intermittent surface water connections."

Similarly, in *Deaton*, Petitioners ask whether a "roadside ditch and the wetland next to it [are] 'navigable waters' under the Clean Water Act?"

Notwithstanding the Government's waiver of an opposition, these recently-filed petitions highlight the continuing confusion in the appellate courts over the Government's authority pursuant to 33 U.S.C. § 1344(a) to regulate wetlands not adjacent to open water consistent with *SWANCC*. Petitions from two (soon to be three) circuits now raise this same fundamental question about whether such authority exists. Contrary to the conclusions reached by the circuits giving rise to these petitions, the Fifth Circuit has already concluded that it does not. *See Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001). Courts, regulatory agencies, and the public have disagreed over how to define the limits of the Government's jurisdiction ever since *SWANCC*. They will continue to do so until this Court provides additional guidance in this area. These additional petitions underscore the need for plenary review of the action below. Petitioners' petition for a writ of certiorari should therefore be granted.

CONCLUSION

For all of the foregoing reasons, the petition should be granted.

Respectfully submitted,

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